TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 251.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

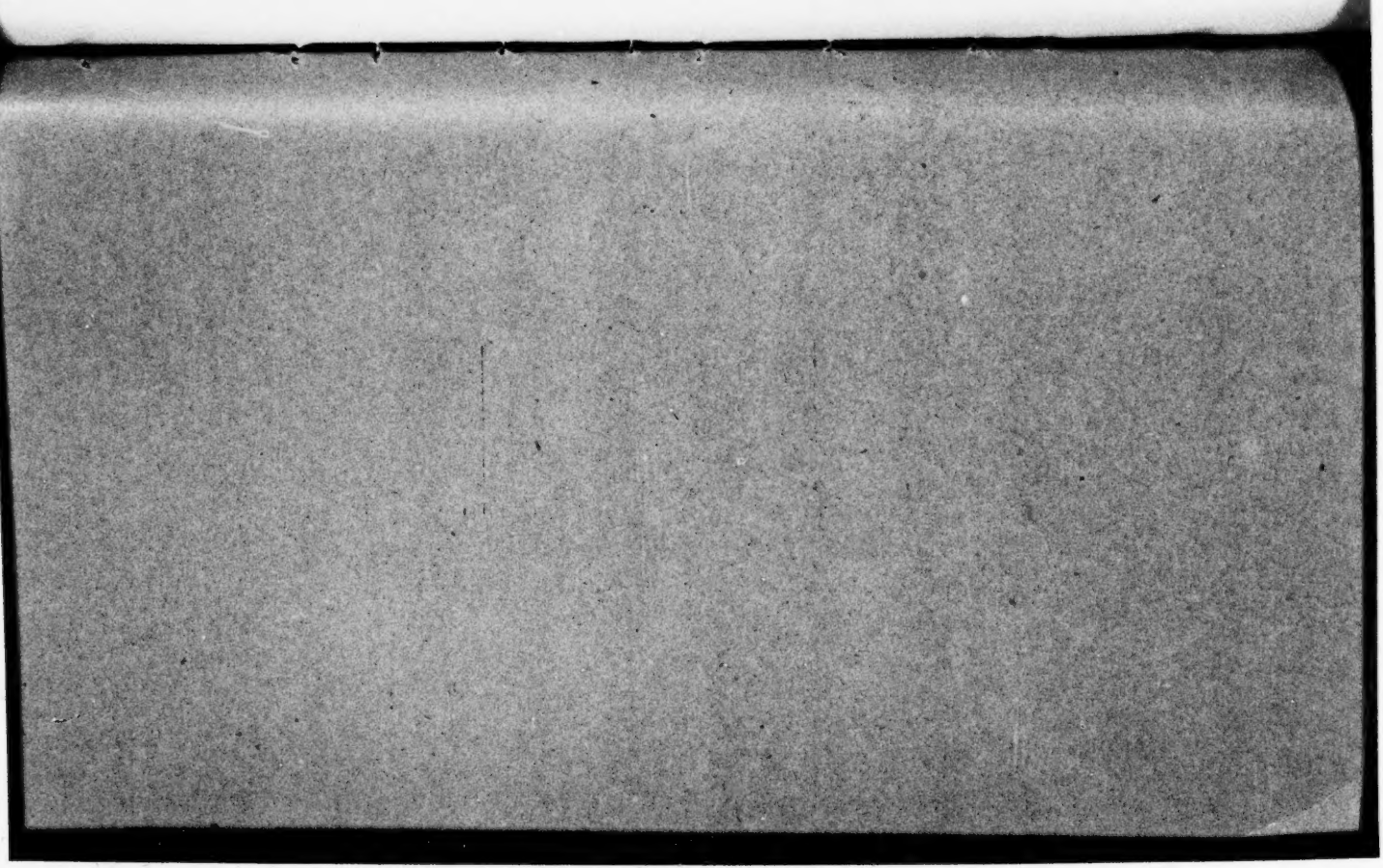
vs.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, RECEIVERS OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 9, 1909.

(21329)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 533.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, RECEIVERS OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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1 UNITED STATES OF AMERICA.

ALPHEUS B. STICKNEY ET AL., COMPLAINANTS,
vs.
THE INTERSTATE COMMERCE COMMISSION, DEFENDANT. | Equity No. 877.

Pleas before the honorable the judges of the Circuit Court of the United States of America for the District of Minnesota, Third Division of the June, A. D. 1908, term of said court, held in the city of St. Paul, in the said district, in the year of our Lord one thousand nine hundred and eight.

Be it remembered that on the 7th day of May, A. D. 1908, came the complainants in the above entitled cause and filed their bill of complaint in the clerk's office of said court, in words and figures following, viz:

2 In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of the Chicago Great Western Railway Company; Chicago Great Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Illinois Central Railroad Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; The Chicago & Alton Railroad Company; The Chicago, Rock Island & Pacific Railway Company; and The Atchison, Topeka & Santa Fe Railway Company, complainants,

vs.

THE INTERSTATE COMMERCE COMMISSION, DEFENDANT.

IN EQUITY.

To the honorable judges of the Circuit Court of the United States within and for the District of Minnesota:

3 Alpheus B. Stickney and Charles H. F. Smith, receivers of the Chicago Great Western Railway Company, citizens of the State of Minnesota; Chicago Great Western Railway Company, a corporation organized under the laws of the State of Illinois; Chicago, Burlington & Quincy Railroad Company, a corporation organized under the laws of the State of Illinois; The Illinois Central

Railroad Company, a corporation organized under the laws of Illinois; Chicago & Northwestern Railway Company, a corporation organized under the laws of the State of Illinois; Chicago, Milwaukee & St. Paul Railway Company, a corporation organized under the laws of the State of Wisconsin; The Chicago & Alton Railroad Company, a corporation organized under the laws of the State of Illinois; The Chicago, Rock Island & Pacific Railway Company, a corporation organized under the laws of Illinois and Iowa; and The Atchison, Topeka & Santa Fe Railway Company, a corporation organized under the laws of the State of Kansas, bring this their bill against the Interstate Commerce Commission, established and existing under and by virtue of an act of Congress of the United States. And thereupon your orators complain and say:

That on the eighth day of January, 1908, in a certain cause then duly pending in the Circuit Court of the United States within and for the District of Minnesota, wherein John A. Humbird and
4 others were complainants and Chicago Great Western Railway Company was defendant, after due proceedings having been had for that purpose, in all respects in accordance with law, your orators, Alpheus B. Stickney and Charles H. F. Smith, were duly appointed receivers of Chicago Great Western Railway Company and have duly qualified as such receivers and are now as such receivers in possession of the railway properties of the said Chicago Great Western Railway Company and are now operating the same as such receivers; that Chicago Great Western Railway Company is a corporation duly organized under and by virtue of the laws of the State of Illinois; that Chicago, Burlington & Quincy Railroad Company is a corporation duly organized under the laws of the State of Illinois; that The Illinois Central Railroad Company is a corporation duly organized under the laws of the State of Illinois; that Chicago & Northwestern Railway Company is a corporation duly organized under the laws of the State of Illinois; that Chicago, Milwaukee & St. Paul Railway Company is a corporation duly organized under the laws of the State of Wisconsin; that The Chicago & Alton Railroad Company is a corporation duly organized under the laws of the State of Illinois; that The Chicago, Rock Island & Pacific Railway Company is a corporation duly organized under the laws of Illi-
5 nois and Iowa; and that The Atchison, Topeka & Santa Fe Railway Company is a corporation duly organized under the laws of the State of Kansas; that the defendant, the Interstate Commerce Commission, has been created and established and during all the times herein mentioned has existed under and by virtue of an act of Congress of the United States, entitled, "An act to regulate commerce," approved February 4th, 1887, and the acts amendatory thereof.

Your orators further aver that your orators, Alpheus B. Stickney and Charles H. F. Smith, as receivers as aforesaid, and your orator,

Chicago Great Western Railway Company have their principal operating office in the city of St. Paul, in the district of Minnesota.

Your orators further aver that Chicago Great Western Railway Company, Chicago, Burlington & Quincy Railroad Company, The Illinois Central Railroad Company, Chicago & North-Western Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Chicago & Alton Railroad Company, The Chicago, Rock Island & Pacific Railway Company, and The Atchison, Topeka & Santa Fe Railway Company are common carriers engaged in the transportation of property by railroad by continuous carriage or shipment from points in the States of Texas, Oklahoma, Kansas, Montana, North Dakota, South Dakota, Nebraska, Wyoming, Colorado, and Indian Territory to Chicago, in the State of Illinois, and have been so engaged for many years last past; and that Alpheus B. Stickney and Charles H. F. Smith, receivers as aforesaid, have been so engaged since the eighth day of January, 1908; that the transportation of live stock from the States aforesaid to the city of Chicago is one of the important constitutents in the business of your orators.

6

Your orators further aver that there have been established and exist in the city of Chicago certain stock yards owned and operated by the Union Stock Yard & Transit Company, known as The Union Stock Yards, which consist of yards, pens, and chutes, together with numerous and extensive buildings, and said Union Stock Yard & Transit Company also owns railway approaches to said stock yards aggregating about two hundred and forty (240) miles of railroad tracks, all of which are within the city of Chicago aforesaid; that the said stock yards are the largest and most extensive in the United States and that adjacent thereto are numerous extensive packing houses, and said stock yards constitute the largest market for the sale and purchase of live stock in the United States.

7

Your orators further aver that the tracks of all of your orators terminate in the city of Chicago and that all of your orators have terminal facilities in said city of Chicago equipped for the business of your orators and sufficient for delivery of all freight consigned for delivery at such terminals of your orators; but your orators aver that none of the railroad tracks owned, controlled, or operated by any of your orators extend to or terminate at the said stock yards of the said Union Stock Yard & Transit Company, and that, in order that your orators may deliver any cars of live stock at said Union Stock Yards, it is necessary that your operators use the lines of track of the said Union Stock Yard & Transit Company, and in some instances, in addition thereto, the tracks of other companies.

Your orators further aver that they have established and duly filed, published, and posted, according to law, tariffs of charges for

their transportation of live stock to the city of Chicago, some of the said rates being for transportation of live stock entirely upon the lines of the company issuing said tariff and a large number of other tariffs being joint tariffs issued by your orators in connection with other companies, which other companies participating in such joint tariffs do not have lines reaching to the city of Chicago.

8 Your orators further aver that the rates fixed in said tariffs for the transportation of live stock to the city of Chicago apply solely to and establish a charge solely for the transportation of said live stock to the terminals upon the tracks of your orators, respectively, in the city of Chicago, and do not apply to or include any charge or compensation whatsoever for any service to be performed by your orators in the transportation and delivery of any live stock beyond the lines of the tracks of your orators.

Your orators further aver that the delivery of live stock at the said Union Stock Yards by your orators involves the distinct and special service by your orators in said city of Chicago of transporting the said live stock beyond the lines of your orators' railway and over the lines of other railroad companies and over the tracks of the said Union Stock Yard & Transit Company, and the unloading of the said live stock at said Union Stock Yards.

Your orators further aver that before the said Union Stock Yards were established all live stock delivered in Chicago by your orators was delivered by each company at its own terminals on its own tracks; and the established rate for the transportation of live stock to Chicago included only the transportation to and delivery at the said terminals of the said companies on their own tracks in the said city of Chicago.

9 Your orators further aver that when the said Union Stock Yards were established and shippers of live stock desired the delivery of their live stock shipped over the lines of your orators' railways at the said Union Stock Yards, your orators did deliver such live stock at the said stock yards beyond the lines of your orators' tracks, without making any charge or receiving any compensation for the said special service of transporting the same beyond the lines of your orators' railways and delivering the same to the said stock yards; although the said Union Stock Yard & Transit Company charged your orators, and your orators paid, twenty-five cents per car for unloading the said live stock at the said stock yards; and said transportation and delivery beyond the lines of your orators' tracks without charge or compensation was continued until 1894.

Your orators further aver that in 1894 the said Union Stock Yard & Transit Company imposed upon all of your orators a trackage charge for the use of its tracks in the transportation of live stock between the lines of your orators' railroads and the said Union Stock Yards; that said trackage charge varied in accordance with the distance traversed over said tracks, being in no case less than

10 eighty cents per car and in some cases as high as one dollar and a half per car.

Your orators further aver that the increased expense involved in the delivery of live stock beyond the lines of your orators' tracks to said stock yards, by reason of the said imposition of said trackage charges by said Union Stock Yard & Transit Company and by reason of enhanced complexity and general cost of such special service made it impracticable for your orators longer to continue to make said delivery of said live stock beyond the lines of their respective railroad tracks without any charge or compensation therefor; thereupon, your orators, taking into account the charges exacted by the said Union Stock Yard & Transit Company, as aforesaid, and the expense to your orators of the transportation and delivery of said live stock beyond their lines to said stock yards, issued, published, filed, and posted, in all respects according to law, their separate tariffs, showing that they would charge shippers of live stock the sum of two dollars per car for the special service of transporting each car of live stock beyond the lines of their respective roads and making delivery thereof at said Union Stock Yards, the said provision of said tariffs being substantially as follows:

11 "GENERAL FREIGHT DEPARTMENT,
"*May 19, 1894.*

"*To all Agents:*

"Taking effect June 1, 1894, the tariffs on live stock and all other traffic received from or delivered to the Union Stock Yards, and all industries located on the tracks of the Union Stock Yards Ry., the Indiana State Line Ry., or the Northern Indiana R. R. at Hammond, Ind., will in addition to the rates named to or from Chicago, be subject to a terminal charge of $2 per car.

"This charge must in all cases be added to the through rate and must be shown separately on the waybill as miscellaneous earnings and a delivering expense; it must also be provided for and shown in contracts and bills of lading.

"The foregoing will apply as a supplement to all tariffs issued by this company, also to all joint tariffs issued by connections and applying over this line. It will supersede entirely rule 7 in the routing and waybilling instructions governing freight destined to and from Chicago locally or points beyond Chicago (C. & N. W. G. F. D. No. 7575; C., St. P., M. & O. G. F. D. No. 1715; F. E. & M. V., and S. C. & P. G. F. D. No. 829 of 1893)."

Your orators further aver that the said tariffs were intended by your orators and their officers to mean, and your orators and
12 their officers understood the said tariffs to mean, that the said charge of two dollars per car was the sole and only charge and compensation made or received by your orators for the service

of transporting said cars of live stock beyond the lines of their respective roads and making delivery of the same at said Union Stock Yards; and that said charge of two dollars per car for said service was segregated from and entirely separate from the charge in the tariffs for the transportation of said live stock from the point of the origin of the shipments to a delivery point on the tracks of your orators in the city of Chicago; and in making, issuing, publishing, and filing the said terminal tariffs your orators and their respective officers intended to provide, and believed that the said tariffs did provide, and construed the said tariffs to provide, that the charge made for the transportation of live stock from the points of origin of the shipments to the said city of Chicago was solely and exclusively for the service involved in the transportation of said live stock from said points of origin of the shipments to a point of delivery on the tracks of your orators, respectively, in the city of Chicago; and that the said last-named charge did not cover or carry any compensation whatever for the transportation and delivery of such live stock beyond the lines of the railroads of your orators, and
13 did not cover or carry any compensation whatever for the transportation and delivery of said live stock from the lines of your orators in the city of Chicago to the said Union Stock Yards.

Your orators further aver that when the said tariffs were issued, published, and filed in 1894, as aforesaid, there was no change made in the charge made in earlier tariffs for the transportation of live stock from the points of the origin of the shipments to the tracks of the railroads of your orators in the city of Chicago, and no change made in the joint rates or tariffs issued, published, and posted by your orators in connection with other railroad companies, in so far as the same fixed the charge for the transportation of live stock from the points of origin of the shipments to the tracks of your orators in the city of Chicago, nor was there any change made in the division or the adjustment of the proportions of said charge made in said joint tariffs between the companies issuing the same. And your orators further aver that at no time was any joint rate agreed upon, issued, published, or posted by your orators and other railroad companies for the transportation of live stock from the points of the origin of the shipments to the city of Chicago wherein any division of the rates between the companies making the
14 same was based upon any consideration whatever of the cost and expense of transporting such live stock beyond the tracks of your orators in the city of Chicago and making delivery thereof at the Union Stock Yards aforesaid.

Your orators further aver that thereafter and since the year 1902, in order that there be no possible misconception of the meaning of the said tariffs and of the purpose of your orators in promulgating the same, there were inserted in the tariffs regularly issued, filed, published, and posted by your orators, as required by law, further pro-

visions making clear the absolute segregation and separation of the charge in said tariffs for the transportation of live stock from the points of the origin of the shipments to a point of delivery on the lines of your orators in the city of Chicago, from the charge in said tariffs for the transportation and delivery of the said live stock beyond the tracks of your orators in the city of Chicago to the Union Stock Yards aforesaid. The provision so inserted in the tariffs issued, published, and posted, as aforesaid, by your orator, The Chicago & North-Western Railway Company, was as follows:

"The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only
15 to live stock intended for delivery at, or received and transported from the stock yards of the company at Mayfair, in Chicago.

"Upon all live stock consigned to or from the Union Stock Yards in Chicago, or industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said U[illegible] Stock Yards Railway, or the Indiana State Line Railway, aforesaid, a charge of two dollars ($2.00) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards or to said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, from this company's own rails, or of transporting such cars from said Union Stock Yards or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway to this company's own rails."

Your orators further aver that thereafter substantially similar provisions were inserted in all the tariffs issued by your orators applying to the transportation of live stock. And your orators further aver that such provisions have been constantly maintained in all the published tariffs of your orators applying to the transportation of live stock, and are now being maintained in all the tariffs in force, issued, filed, published, and posted by your orators for the transportation of live stock.

16 Your orators further aver that from the year 1894 to the present time there has been a segregation and separation under the tariffs of your orators for the transportation of live stock of the charge laid in the tariffs of your orators for the transportation from the points of the origin of the shipments to a point of delivery on the tracks of your orators in the city of Chicago, from the charge laid in said tariffs for the transportation and delivery of said live stock beyond the tracks of your orators in the city of Chicago and to the Union Stock Yards aforesaid; with the result that the charge laid in the tariffs for the transportation of live stock from the points of the origin of the shipments to the point of delivery upon the tracks of your orators in the city of Chicago was laid and collected solely

and exclusively for the service rendered in transporting such live stock from the points of the origin of the shipments to the point of delivery upon the tracks of your orators in the city of Chicago; and the charge laid in the tariffs for the transportation and delivery of live stock beyond the tracks of your orators and to the Union Stock Yards aforesaid, was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of your orators and delivering the same at the Union Stock Yards aforesaid.

17 Your orators further aver that on the tenth day of December, 1907, the defendant, the Interstate Commerce Commission, entered an order requiring your orators to cease and desist from charging the said terminal charge of two dollars per car for the transportation of live stock beyond the tracks of your orators in the city of Chicago, and for the delivery thereof at the Union Stock Yards aforesaid, and requiring your orators to establish and put in force for said service a charge of one dollar per car, the said order being in words and figures as follows, to wit:

"It is ordered, that the defendants, The Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago & North-Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago, Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company; and Illinois Central Railroad Company, be, and they are hereby, required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car.

"It is further ordered, that said defendants be, and they are hereby, notified and required to establish and put in force on or

18 before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the State of Ilinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them."

Your orators further aver that thereafter by orders duly entered by said defendant, the Interstate Commerce Commission, the time for the compliance by your orators with the above mentioned order was duly and regularly extended until the fifteenth day of May, 1908. Your orators further aver that the said defendant, the Interstate Commerce Commission, served the said order by mailing a copy thereof to the principal officers of your orators, respectively, and due service of the orders extending the time for the compliance by your orators with the said order has been made on your orators.

Your orators further aver that the said order of the said defendant, the Interstate Commerce Commission, was made upon a complaint filed with said body by the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange, to which complaint answers were filed by your orators and testimony adduced by the said parties.

19 Your orators further aver that the actual cost to each of your orators of the service of transporting cars of live stock beyond the tracks of your orators in the city of Chicago to the Union Stock Yards aforesaid and there making delivery thereof exceeds, and ever since 1894 has exceeded, in each instance the sum of two dollars per car, the present terminal charge therefor, and that under the present tariff and charge of two dollars per car for the said service your orators and each of them are now rendering the said service to shippers of live stock delivered at said Union Stock Yards of transporting the said cars of live stock beyond the tracks of your orator in Chicago to the Union Stock Yards, and there making delivery thereof at a charge less than the actual expense to your orators, respectively, necessarily incurred in the performance of the said service. Your orators further aver that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orators to desist from the said charge of two dollars per car for the transportation of live stock beyond the tracks of your orators in the city of Chicago and to the Union Stock Yards aforesaid, and there making delivery thereof, is unreasonable, unjust, oppressive, and unlawful, in that, among other things, the said order prohibits your orators from charging for the service aforesaid the said sum

20 of two dollars per car, as above set forth, which is less than the actual expense to your orators necessarily incurred in the performance of the service for which, as aforesaid, the said charge is laid.

Your orators further aver that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orators to establish and put in force a tariff laying a charge for the service of transporting cars of live stock beyond the tracks of your orators' roads in the city of Chicago and to the Union Stock Yards, as aforesaid, and there making delivery of the same, of not more than one dollar per car is unreasonable, unjust, oppressive, and unlawful, in that, among other things, the said order attempts to compel your orators to perform the service aforesaid for a charge of one dollar per car, which sum, as hereinabove set forth, is less than one-half of the expense actually incurred and sustained by your orators in the performance of the service for which the said charge is laid.

Your orators further aver that, by reason of the facts aforesaid, the said charge of two dollars per car now maintained by your orators by their tariffs for the service of transporting cars of live stock beyond the tracks of your orators in the city of Chicago to the Union Stock Yards aforesaid, and there making delivery of

said live stock, is a just and reasonable charge, and one proper to be made, and is a charge which yields no profit to your orators or any of them from the performance of the service for which the said charge is laid.

Your orators further aver that if the said order of the said defendant, the Interstate Commerce Commission, should become effective and go into effect and be enforced, it would compel your orators to perform the service of transporting the cars of live stock from the tracks of your orators in the city of Chicago to the Union Stock Yards aforesaid, and there make delivery of the same, at a charge which would be less than one-half of the actual cost and expense necessarily incurred and sustained by your orators in the performance of said service, and it would thereby deprive your orators of their property without due process of law and deny to your orators the equal protection of the laws, all in violation of the Constitution of the United States.

Your orators further aver that the said order of the defendant, the Interstate Commerce Commission, should not be enforced because the said Interstate Commerce Commission has heretofore expressly found as a fact that a charge of two dollars per car for the service of transporting live stock from the tracks of your orators in the city of Chicago to the said Union Stock Yards, and there making delivery thereof, was less than the actual expense incurred by your orators in rendering the said service. And your orators aver that said finding of fact, so made by the said defendant, the Interstate Commerce Commission, has never been set aside, reversed, or in any way modified; but, on the contrary, your orators aver that said defendant, the Interstate Commerce Commission, within the last few months, and in the very proceeding in which said order herein complained of was entered, has reiterated the said finding and recognized the continuing existence of the facts so found.

Your orators further aver that the number of cars of live stock transported by your orators from their tracks to the Union Stock Yards, as aforesaid, and there delivered by your orators is very large, exceeding in number three hundred thousand cars per year, and that, if the said order of the said defendant, the Interstate Commerce Commission, is allowed to remain and to become and be effective and enforced, the same will entail upon your orators a loss of more than three hundred thousand dollars per year, which said loss will be absolute and complete to your orators.

Your orators further aver that, if the said order of the said defendant, The Interstate Commerce Commission, is allowed to become and be effective, very many suits for penalties will be brought against each one of your orators in various of the judicial districts of the United States, and very many suits will be brought against each of your orators by many persons interested in said order and its enforcement and claiming to be injured by the

acts of your orators unless said order is obeyed, which said suits will be brought and prosecuted as aforesaid by very many persons in many of the judicial districts of the United States against each of your orators; whereby your orators and each of them will be subjected to a great multiplicity of suits and great loss and damage will be inflicted upon your orators and each of them, all of which acts and doings will greatly injure and embarrass your orators and each of them in the transaction of their business.

Your orators further aver that notwithstanding the facts aforesaid, the said defendants, The Interstate Commerce Commission, maintains and intends to maintain, and will, unless the same is enjoined or suspended by the order of this honorable court, maintain the said order as an effective order; and institute, or suffer to be instituted, the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator.

24 Your orators, therefore, pray that upon the filing of this bill a temporary or interlocutory order be entered herein suspending the said order of the said Interstate Commerce Commission and restraining the enforcement of the said order of the said commission and restraining the said commission from taking any steps or instituting any proceedings to enforce the said order, and that upon a final hearing of this cause a decree be entered herein setting aside and annulling the said order of the said Interstate Commerce Commission and perpetually enjoining the enforcement of the said order and perpetually enjoining the said defendant and its members, their agents, servants, and representatives, from enforcing the said order and from taking any steps or instituting any proceedings for the enforcement of the said order.

Your orators further pray that, if any delay intervenes between the filing of this bill and the issuance of a temporary or interlocutory order, as prayed for herein, an order be issued herein suspending the said order of the said Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the temporary or interlocutory order prayed for herein.

25 And your orators further pray that such other and further relief be granted in the premises as justice and equity may require.

Your orators further pray that your honors grant unto your orators a writ of subpœna of the United States of America, directed to the said Interstate Commerce Commission, commanding it at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this honorable court, and then and there full, true and complete answer make to all and singular the premises; but not under oath (an answer under oath being hereby expressly waived) and to stand to and abide such order and decree

herein as to your honors shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray, etc.

A. B. STICKNEY,
CHAS. H. F. SMITH,
Receivers of the Chicago Great Western Railway Company.
CHICAGO GREAT WESTERN RAILWAY COMPANY,
By A. B. STICKNEY, *President.*
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By CHESTER M. DAWES,
Its General Solicitor.

26 ILLINOIS CENTRAL RAILROAD COMPANY,
By J. M. DICKINSON,
Its General Counsel.

[Corporate seal.]
CHICAGO & NORTHWESTERN RAILWAY COMPANY,
By L. W. BOWERS,
Its General Counsel.
CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY,
By J. H. HILAND,
Second Vice-President.
CHICAGO & ALTON RAILROAD COMPANY,
By C. W. KING,
General Freight Agent.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By R. A. JACKSON,
Its First V. P. and General Solicitor.

[Corporate seal.]
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
By GEO. T. NICHOLSON,
Third Vice-President.

WILLIAM D. MCHUGH,
Solicitor for Complainants.

WILLIAM D. MCHUGH,
Of Counsel.

27 STATE OF MINNESOTA,
County of Ramsey, ss:

Alpheus B. Stickney, being first duly sworn according to law, deposes and says that he is one of the receivers of the Chicago Great Western Railway Company and one of the complainants in the above entitled cause; that he is also president of said company; that he knows the facts stated in the foregoing bill of complaint and that the said facts are true.

ALPHEUS B. STICKNEY.

Subscribed and sworn to before me this 7th day of May, A. D. 1908.

[Notarial seal.]

A. G. BRIGGS,
Notary Public,
Ramsey County, Minnesota.

My commission expires July 3d, 1908.

STATE OF ILLINOIS,
County of Cook, ss:

Chester M. Dawes, being first duly sworn, says that he is the general solicitor of the Chicago, Burlington & Quincy Railroad Company, one of the complainants in the above entitled cause; that he
28 knows the facts stated in the above and foregoing bill of complaint, and that the said facts are true.

CHESTER M. DAWES.

Subscribed and sworn to before me this 6th day of May, A. D. 1908.
[Notarial seal.] J. H. PETTIBONE,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

J. M. Dickinson, being first duly sworn, says that he is the general counsel of the Illinois Central Railroad Company, one of the complainants in the above entitled cause; that he knows the facts stated in the above and foregoing bill of complaint and that the said facts are true.

J. M. DICKINSON.

Subscribed and sworn to before me this 6th day of May, A. D. 1908.
[Notarial seal.] ANDREW P. HAMBURG,
Notary Public.

29 STATE OF ILLINOIS,
County of Cook, ss:

Samuel A. Lynde, being first duly sworn, says that he is the general solicitor of the Chicago & North-Western Railway Company, one of the complainants in the above-entitled cause; that he knows the facts stated in the above and foregoing bill of complaint, and that the said facts are true.

SAMUEL A. LYNDE.

Subscribed and sworn to before me this 6th day of May, A. D. 1908.
[Notarial seal.] FREDERIC BURNHAM,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

J. H. Hiland, being first duly sworn, says that he is the 2nd vice-president of the Chicago, Milwaukee & St. Paul Railway Company, one of the complainants in the above-entitled cause; that he knows the facts stated in the above and foregoing bill of complaint, and that the said facts are true.

J. H. HILAND.

30 Subscribed and sworn to before me this sixth day of May, A. D. 1908.
[Notarial seal.] W. D. MILLARD,
Notary Public.

POOR COPY

STATE OF ILLINOIS,
County of Cook, ss:

C. W. King, being first duly sworn, says that he is the general freight agent of the Chicago & Alton Railroad Company, one of the complainants in the above-entitled cause; that he knows the facts stated in the above and foregoing bill of complaint, and that the said facts are true.

C. W. KING.

Subscribed and sworn to before me this 6th day of May, A. D. 1908.
[Notarial seal.] FREDERIC BURNHAM,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

H. Gower, being first duly sworn, says that he is the freight
31 traffic manager of the Chicago, Rock Island & Pacific Railway Company, one of the complainants in the above-entitled cause; that he knows the facts stated in the above and foregoing bill of complaint, and that the said facts are true.

H. GOWER.

Subscribed and sworn to before me this 6th day of May, A. D. 1908.
[Notarial seal.] CHAS. F. SCHWARZ,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

George T. Nicholson, being first duly sworn, says that he is the 3rd vice-president of the Atchison, Topeka & Santa Fe Railway Company, one of the complainants in the above-entitled cause; that he knows that the facts are true.

GEO. T. NICHOLSON.

Subscribed and sworn to before me this 6th day of May, A. D. 1908.
[Notarial seal.] FREDERIC BURNHAM,
Notary Public.

(Endorsed:) Bill of complaint. Filed May 7th, A. D. 1908. Henry D. Lang, clerk.

Thereafter and on the same day the following præcipe for chancery subpœna was filed in said cause, viz:

32 Circuit Court of the United States, District of Minnesota, Third Division.

ALPHEUS B. STICKNEY ET AL.
vs.
THE INTERSTATE COMMERCE COMMISSION.
} Præcipe for chancery subpœna.

To the clerk of the above-named court:

Please issue a chancery subpœna in the above-entitled cause returnable at the June, 1908, rule day.

WILLIAM D. MCHUGH,
Solicitor for Complainants.

First Nat. Bk. Bldg., Omaha, Neb.

(Endorsed:) Præcipe for chancery subpœna. Entered C. R. "B," page 27. Filed May 7, 1908. Henry D. Lang, clerk.

Thereafter and on the same day the following order for chancery subpœna was entered of record in said cause, viz:

33 U. S. Circuit Court, District of Minnesota, Third Division. Chancery Common Rule and Order Book.

1908. May 7.

A. B. STICKNEY ET AL.
vs.
THE INTERSTATE COMMERCE COMMISSION. } Equity No. 877.

The complainant having filed a bill in equity in this cause, on application of William D. McHugh, solicitor for said complainants, it is hereby ordered that a chancery subpœna issue as therein prayed. Common Rule and Order Book "C," page 7.

And afterwards on the same day the following chancery subpœna was issued out of and under the seal of said court, viz:

34 United States of America, District of Minnesota, Third Division.

The President of the United States of America to the Interstate Commerce Commission, greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the Circuit Court of the United States for the District of Minnesota, on the first Monday of June, next, at the city of Saint Paul, then and there to answer the bill of complaint of Alpheus B. Stickney and Charles H. F. Smith, receivers of the Chicago Great Western Railway Company et al., citizens of various States of the United States of America, filed against you on the 7th day of May, A. D. 1908. Hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 7th day of May, 1908.

Issued at my office in the city of St. Paul under the seal of said Circuit Court, the day and year last aforesaid.

[Seal of court.] HENRY D. LANG, *Clerk.*

Memorandum: The above named defendant to enter its appearance in this suit in the clerk's office aforesaid, on or before the day at which this writ is returnable, otherwise the bill may be taken pro confesso.

HENRY D. LANG, *Clerk.*

WILLIAM D. MCHUGH,
Complainants' Solicitor.

35 (Endorsed:) Chancery subpœna, returnable to June rules, 1908.

Served the within writ on the Interstate Commerce Commission by service of the copy of said writ on Martin A. Knapp, chairman of said commission, personally, this 9th day of May, 1908.

AULICK PALMER,
U. S. Marshal for the District of Columbia.

Filed May 13th, 1908. Henry D. Lang, clerk.

Thereafter and on May 11th, 1908, the following certificate of the Attorney-General was filed in said cause, viz:

36 In the Circuit Court of the United States, within and for the District of Minnesota, Third Division.

A. B. STICKNEY AND CHARLES H. F. SMITH, receivers of the Chicago, Great Western Railway Company; Chicago, Burlington & Quincy Railroad Company; The Illinois Central Railroad Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; The Chicago & Alton Railroad Company; The Chicago, Rock Island & Pacific Railway Company; and The Atchison, Topeka & Santa Fe Railway Company, complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In Equity No. 877.

To the clerk of the United States Circuit Court in and for the District of Minnesota, at St. Paul:

CERTIFICATE OF THE ATTORNEY-GENERAL.

I, Charles J. Bonaparte, Attorney-General of the United States, hereby certify that the above-entitled cause, which has been filed in your court, being a suit in equity to enjoin and set aside an order of the Interstate Commerce Commission, prescribing the charges to be made by the aforesaid railroads as a terminal charge for the delivery of live stock at the Union Stock Yards of Chicago, is a case of general public importance and comes under the provisions of the act to expedite hearings and determination of suits in equity, approved February 11, 1903, and made applicable to this case by virtue of the provisions of section 16 of the act to regulate commerce, as amended and
37 approved June 29, 1906, and I therefore request that the same be given precedence over other causes and be in every way expedited, and that the same be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of the Circuit Court; and in case the judges sitting in such cause shall be divided in opinion, that the case shall be certified to the Supreme

Court for review in like manner as if taken there upon appeal, as provided by the said act of February 11, 1903.

You will, therefore, service notice hereof to the circuit judges of said court as provided in the said act of February 11, 1903.

CHARLES J. BONAPARTE,
Attorney-General.
By HENRY M. HOYT,
Solicitor-General and Acting Attorney-General.

WASHINGTON, *May 9, 1908.*

(Endorsed:) Certificate of the Attorney-General under the acts of February 11, 1903, and June 29, 1906. Filed May 11th, 1908. Henry D. Lang, clerk.

Thereafter, and on the same day, the following certificate of Henry D. Lang, clerk, was filed in said court, viz:

38 In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

A. B. STICKNEY AND CHARLES H. F. SMITH, RECEIVERS of the Chicago Great Western Railway Company; Chicago Great Western Railway Company; Chicago, Burlington & Quincy Railroad Company; The Illinois Central Railroad Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; The Chicago & Alton Railroad Company; The Chicago, Rock Island & Pacific Railway Company; and The Atchison, Topeka & Santa Fe Railway Company, complainants,

vs.

THE INTERSTATE COMMERCE COMMISSION, DEFENDANT.

In equity.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I, Henry D. Lang, clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that on the 11th day of May, A. D. 1908, I personally handed to and left with the Honorable Walter H. Sanboen and the Honorable William C. Hook, two of the United States circuit judges for the Eighth Circuit, at St. Paul, Minnesota, a duly certified copy of the certificate of the Attorney-General, under the acts of February 11th, 1903, and June 29th, 1906, this day filed in the above entitled cause, and that on the same day I mailed a certified copy of said certificate to the Honorable Willis Van Devanter by enclosing a copy thereof in an envelope addressed to him at Cheyenne, Wyoming, and depositing the same in

the post-office at St. Paul, Minnesota, and that on the
39 same day I also mailed a duly certified copy of said certificate to the Honorable Elmer B. Adams by enclosing the same in an envelope addressed to him at St. Louis, Missouri, and depositing the same in the post-office at said St. Paul, Minnesota.

In witness whereof I have hereunto set my hand and official seal this 11th day of May, A. D. 1908.

[SEAL.] HENRY D. LANG, *Clerk.*

(Endorsed:) Certificate of Henry D. Lang, clerk, of delivery of Attorney-General certificate to U. S. circuit judges. Filed May 11th, 1908. Henry D. Lang, clerk.

Thereafter and on May 13th, 1908, the following notice of motion for a temporary restraining order, etc., was filed in said cause, viz:

40 In the Circuit Court of the United States, within and for the District of Minnesota, Third Division.

A. B. STICKNEY AND CHARLES H. F. SMITH, RECEIVERS of the Chicago Great Western Railway Company; Chicago Great Western Railway Company; Chicago, Burlington & Quincy Railroad Company; The Illinois Central Railroad Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; The Chicago & Alton Railroad Company; The Chicago, Rock Island & Pacific Railway Company; and The Atchison, Topeka & Santa Fe Railway Company, complainants.	In equity No. 877.
vs.	
THE INTERSTATE COMMERCE COMMISSION, DEFENDANT.	

To the Interstate Commerce Commission:

You are hereby notified that in the above entitled cause a bill has been filed in the Circuit Court of the United States within and for the District of Minnesota, wherein the above named complainants pray a decree of said court setting aside and annulling that certain order entered by you, the said Interstate Commerce Commission, on or about the tenth day of December, 1907, in that certain proceeding then pending before you known as No. 939, wherein the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange were complainants and the Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, the Chicago & Northwestern Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, the Chicago & Alton Railroad Com-
41 pany, the Chicago, Rock Island and Pacific Railway Company,

the Atchison, Topeka and Santa Fe Railroad Company, and the Illinois Central Railroad Company were respondents.

You are hereby notified that on the 14th day of May, 1908, at 10 a. m., before the said court at the federal court room in the city of St. Paul, State and District of Minnesota, the complainants in said suit will apply to said court for a temporary or interlocutory order suspending the above mentioned order entered by you as aforesaid and enjoining the enforcement thereof, and the said application will be based upon the bill of complaint, duly verified, a copy of which is attached hereto.

You are further notified that, if any delay intervenes in the issuance of said temporary or interlocutory order by said court on said 14th day of May, 1908, the complainants in said suit will at said time and place pray the issuance of an order suspending the above mentioned order entered by you and enjoining its enforcement until the hearing and final determination of the said application for a temporary or interlocutory order, as aforesaid.

WILLIAM D. MCHUGH,
Solicitor for complainants above named,
413 First National Bank Bldg., Omaha, Nebraska.

42 Service of a copy of the within notice with copy of the bill of complaint therein referred to is hereby acknowledged this 8th day of May, 1908, at the office of the Interstate Commerce Commission, in the city of Washington, D. C.

MARTIN A. KNAPP,
Chairman Interstate Commerce Commission.

(Endorsed:) Notice of motion for a temporary restraining order, etc. Filed May 13th, 1908. Henry D. Lang, clerk.

Thereafter and on the 15th day of May, 1908, the following receipt of Hon. Elmer B. Adams was filed in said cause, viz:

43 Hon. Walter H. Sanborn, St. Paul, Minn.
Hon. Willis Van Devanter, Cheyenne, Wy.
Hon. William C. Hook, Leavenworth, Kans. } Circuit Judges.
Hon. Elmer B. Adams, St. Louis, Mo.
Hon. Wm. Lochren, Minneapolis, Minn. } District Judges.
Hon. Page Morris, Duluth, Minn. }

General terms.
First Tuesday in June and first Tuesday in December.
Rule day. First Monday in each month.

[United States Circuit Court, District of Minnesota. Henry D. Lang, clerk. Louis B. Trott, deputy.]

ST. PAUL, *May 11, 1908.*

Hon. ELMER B. ADAMS,
U. S. Circuit Judge, St. Louis, Mo.

MY DEAR JUDGE: I hand you herewith a certified copy of certificate of the Attorney-General under the acts of February 11, 1903,

and June 29, 1906, filed to-day in case No. 877, equity, Alpheus B. Stickney et al. v. Interstate Commerce Commission. Kindly acknowledge receipt thereof.

Sincerely, yours. HENRY D. LANG, *Clerk.*

Dictated.
Enc.

Received the above May 13, '08.

ELMER B. ADAMS.

(Endorsed:) Receipt of Hon. Elmer B. Adams, for certified copy of certificate of Attorney-General. Filed May 15th, 1908. Henry D. Lang, clerk.

Thereafter and on May 28th, 1908, the following affidavit of H. R. McCullough was filed in said cause, viz:

44 STATE OF ILLINOIS,
County of Cook, ss:

H. R. McCullough, being first duly sworn, on oath says that he the vice-president of the Chicago & Northwestern Railway Company, one of the complainants in the above entitled cause.

Affiant further says that he is familiar with the tariff of said company, duly filed, issued, and published according to law, showing the charge for transportation of live stock.

Affiant further says that the following provision of said tariff, to wit:

"The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at or received and transported from the stock yards of the company at Mayfair, in Chicago.

"Upon all live stock consigned to or from the Union Stock Yards in Chicago or industries located on the Union Stock Yards Railway, or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway aforesaid, a charge of two dollars ($2.00) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards or to said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, from this company's own rails or of transporting such cars from said Union Stock Yards, or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, to this company's own rails,"

has been in the tariffs filed, issued, and published by said company for the transportation of live stock since the year 1904.

45 Affiant further says that the said tariff provision is construed by the officials of said company to mean, and that the purpose and object of inserting the said provision in the said tariffs was that

it should mean, that the charge laid in said tariffs of $2.00 per car for the transportation and delivery of live stock beyond the tracks of said company and to the Union Stock Yards in Chicago was separated and segregated from the charge laid in the said tariffs for the transportation of live stock from the points named therein to the tracks and stock yards of said company at Mayfair, in Chicago; and that the purpose and object of said provision in said tariffs was that the charges therein laid for the transportation of live stock from the points therein named to the tracks and yards of said company at Mayfair, in Chicago, was charged and collected solely and exclusively for the transportation of such live stock from said points to the tracks and yards of said company at Mayfair; and that said charge of $2.00 per car laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said company to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of such company and delivering the same to the Union Stock Yards aforesaid, and said charge of two dollars per car constituted the only charge and the only compensation for said last mentioned service.

H. R. McCULLOUGH.

Subscribed in my presence and sworn to before me, this 25th day of May, 1908.

[Notarial seal.] OVIDE LANGLOIS,
Notary Public, Cook County, Illinois.

46 STATE OF ILLINOIS,
County of Cook, ss:

M. M. Kirkman, being first duly sworn, on oath says that he is the comptroller of the Chicago & Northwestern Railway Company, and as such is familiar with the method in which the accounts of the said company are kept and have been kept for some years last past.

Affiant further says that the moneys received by said company under the terminal charge of $2.00 per car for the transportation of live stock beyond the yards of said company in Chicago to the Union Stock Yards in Chicago is not now and never was entered upon the books and accounts of the said company as receipts from freight for the transportation of live stock, but that on the contrary the same have been kept entirely separate upon the books of the said company from the accounts of the moneys received by said company for the transportation of live stock from the points of origin of the shipment to the tracks and yards of said company at Mayfair; that the moneys received for the transportation of live stock by said company from the points of origin of the shipments to the yards and tracks at Mayfair, in Chicago, have been kept in the accounts of said company as freight earnings, while the moneys received by said company under the terminal charge aforesaid of $2.00 per car for the transportation of such live stock beyond the tracks of said company in Chicago, and to the Union Stock Yards aforesaid, have been entered in the said

accounts as miscellaneous earnings or as switching earnings
47 upon the books of said company.

Affiant further says that attached to this affidavit, and marked "Exhibit A," is an original waybill issued in connection with a shipment of live stock, which live stock was transported to and delivered at the Union Stock Yards in Chicago by said company; and affiant says that the method of entering the freight charges for the transportation of the live stock from the point of origin of the shipment to the tracks and yards of said company at Mayfair, as one item and the entering of the terminal charge aforesaid as a separate item has been the uniform course and practice pursued in the business of said company for a number of years last past, and that the method of entering the said items and charges separately, as shown by said waybill marked "Exhibit A," is the method adopted generally in the business of said company, and the waybills of said company issued in connection with the transportation of live stock delivered at said Union Stock Yards are in this respect similar to the waybill attached hereto as "Exhibit A."

E. J. B. M. M. KIRKMAN.

Subscribed in my presence and sworn to before me, this 25th day of May, 1908.

[Notarial seal.] JOSEPH B. REDFIELD,
Notary Public, Cook County, Illinois.

(Endorsed:) Affidavits of Chicago & Northwestern Railway Co. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

49 Thereafter and on the same day the following affidavit of W. E. Keepers was filed in said cause, viz:

STATE OF ILLINOIS,
County of Cook, ss.

W. E. Keepers, being first duly sworn, on oath says that he is the general freight agent of the Illinois Central Railroad Company, one of the complainants herein.

Affiant further says that attached to this affidavit, marked "Exhibit A," is a copy of the tariff of said company duly filed, issued, and published according to law and now in force showing the charge for the transportation of live stock.

Affiant further says that the provisions of the said tariff showing that the rates therein named apply only to the transportation of live stock from the points named to the tracks and yards of the company in Chicago, and that the terminal charge of $2.00 per car was made solely for the transportation of such live stock beyond the tracks of said company and to the Union Stock Yards in Chicago, are the provisions which have been in tariffs issued for said company for a number of years last past and since the year 1904.

Affiant further says that the said tariff provisions are construed by the officials of said company to mean, and that the purpose and object

of inserting the said provisions in said tariff were, that it should mean that the charge laid in said tariff of $2.00 per car for the transportation and delivery of live stock beyond the tracks of said company and to the Union Stock Yards in Chicago, was separated and
50 segregated from the charge laid in said tariffs for the transportation of live stock from the points named therein to the yards of said company upon the tracks of said company in Chicago; and that the purpose and object of said provisions in said tariffs were that the charge therein laid for the transportation of live stock from the points therein named to the yards of said company upon the tracks of said company in Chicago was charged and collected solely and exclusively for the transportation of such live stock from the said points to the yards of said company upon the tracks of said company in Chicago; and that said charge of $2.00 per car laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said company to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of said company, and delivering the same at the Union Stock Yards aforesaid: and said charge of $2.00 per car constitued the only charge and the only compensation for said last mentioned service.

W. E. KEEPERS.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] ANDREW P. HUMBURG,
Notary Public, Cook County, Illinois.

* * * * * * *

59 Thereafter and on the same day the following affidavit of C. F. Krebs was filed in said cause, to wit:

STATE OF ILLINOIS,
County of Cook, ss.

C. F. Krebs, being first duly sworn, on oath says that he is the comptroller of the Illinois Central Railroad Company, one of the complainants herein, and as such is familiar with the method in which the accounts of said company are kept, and have been kept for some years last past.

Affiant further says that the moneys received by said company under the terminal charge of $2.00 per car for the transportation of live stock beyond the yards of said company upon the tracks of said company in Chicago, and to the Union Stock Yards in Chicago, is not now entered upon the books and accounts of the said company as receipts from freight for transportation of live stock; but, on the contrary, the same are kept entirely separated and segregated upon the books of said company from the accounts of the moneys received by said company for the transportation of live stock from points of origin of the shipment to the yards of said company upon the tracks of said company in Chicago; that the moneys received from the

transportation of live stock of said company from the points of origin of the shipment to the yards of said company upon said company's tracks in Chicago have been kept in the accounts of said company as freight earnings, and the moneys received by the said company under the terminal charge aforesaid of $2.00 per car for the transportation of such live stock beyond the tracks of said company in Chicago, and to the Union Stock Yards aforesaid, have been
60 entered in the accounts of said company in a separate account.

CON. F. KREBS.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] ANDREW P. HUMBURG,
Notary Public, Cook County, Illinois.

61 STATE OF ILLINOIS,
County of Cook, ss.

C. F. Krebs, being first duly sworn, on oath says that he is the comptroller of the Illinois Central Railroad Company, one of the complainants herein, and as such is familiar with the method in which the accounts of said company are kept, and have been kept for more years last past.

Affiant further says that attached to this affidavit, and marked "Exhibit A," is an original waybill issued in connection with a shipment to and delivery at the Union Stock Yards in Chicago; and affiant further says that the rule and practice is, and for many years last past have been *been*, for said company to issue waybills in connection with the transportation of live stock delivered at the Union Stock Yards similar to the waybills marked "Exhibit A," in this, that they show, as does "Exhibit A," the separate entering thereon of the freight charge for the transportation of the said live stock and the terminal charge aforesaid.

CON. F. KREBS.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] ANDREW P. HUMBURG,
Notary Public, Cook County, Illinois.

(Endorsed:) Affidavits of Illinois Central Railroad Company. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

63 Thereafter and on the same day the affidavits of C. G. Weaver and M. A. Patterson were duly filed in said cause, viz:

STATE OF ILLINOIS,
County of Cook, ss.

C. G. Weaver, being first duly sworn, on oath says that he is the auditor, freight traffic, of the Chicago, Rock Island & Pacific Railway Company, one of the complainants herein, and as such is familiar

with the method in which the accounts of said company are kept and have been kept for some years last past.

Affiant further says that attached to this affidavit and marked "Exhibit A" is an original waybill issued in connection with a shipment to and delivery at the Union Stock Yards of said company in Chicago; and affiant further says that the waybills issued by said company for many years last past, in connection with the transportation of live stock delivered at the Union Stock Yards, are similar to the waybill marked "Exhibit A" in this, that they show, as does "Exhibit A," the separate entering thereon of the freight charge for the transportation of the said live stock and the terminal charge aforesaid.

C. G. WEAVER.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.]

CHARLES T. SWARZ,
Notary Public, Cook County, Illinois.

* * * * * * *

65 STATE OF ILLINOIS,
County of Cook, ss.

M. A. Patterson, being first duly sworn, on oath says that he is the assistant general freight agent of the Chicago, Rock Island and Pacific Railway Company, one of the complainants herein.

Affiant further says that attached to this affidavit, marked "Exhibit A," is a copy of the tariff of said company, duly filed, issued, and published according to law and now in force, showing the charge for the transportation of live stock.

Affiant further says that the provisions of the said tariff showing that the rates therein named apply only to the transportation of live stock from the points named to the tracks and yards of the company in Chicago, and that the terminal charge of $2.00 per car was made solely for the transportation of such live stock beyond the tracks of the said company and to the Union Stock Yards in Chicago, are the provisions which have been in tariffs issued for said company for a number of years last past, and since the year 1904.

Affiant further says that the said tariff provisions are construed by the officials of said company to mean and that the purpose and object of inserting the said provisions in said tariff were that it should mean that the charge laid in said tariff of $2.00 per car for the transportation and delivery of live stock beyond the tracks of said company and to the Union Stock Yards in Chicago, was separated and segregated from the charge laid in said tariffs for the transportation of live stock from the points named therein, to the yards of said company upon the tracks of said company in Chicago; and that the purpose and object of said provisions in said tariffs were that the charge therein laid for the transportation of live stock from the points therein named to the yards of said company upon the tracks of said company in Chicago was charged and collected solely and ex-

66

clusively for the transportation of such live stock from the said points to the yards of said company upon the tracks of said company in Chicago, and that said charge of $2.00 per car laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said company to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of said company, and delivering the same at the Union Stock Yards aforesaid; and said charge of $2.00 per car constituted the only charge and the only compensation for said last-mentioned service.

M. A. PATTERSON.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] CHARLES T. SWARZ,
Notary Public, Cook County, Illinois.

(Endorsed:) Affidavits of Chicago, R. I. & P. Ry. Co. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

72 STATE OF ILLINOIS,
County of Cook, ss:

J. H. Hiland, being first duly sworn, on oath says that he is the 3rd vice-prest. of the Chicago, Milwaukee & St. Paul Railway Company, one of the complainants herein.

Affiant further says that attached to this affidavit, market "Exhibit A," is a copy of the tariff of said company duly filed, issued, and published according to law and now in force showing the charge for transportation of live stock.

Affiant further says that the provisions of the said tariff showing that the rates therein named apply only to the transportation of live stock from the points named to the tracks and yards of the company in Chicago, and that the terminal charge of $2.00 per car was made solely for the transportation of such live stock beyond the tracks of said company and to the Union Stock Yards in Chicago are the provisions which have been in tariffs issued for said company for a number of years last past, and since the year 1904.

Affiant further says that the said tariff provisions are construed by the officials of said company to mean, and that the purpose and object of inserting the said provisions in said tariff were that it should mean, that the charge laid in said tariff of $2.00 per car for the transportation and delivery of live stock beyond the tracks of

73 said company and to the Union Stock Yards in Chicago was separated and segregated from the charge laid in said tariffs for the transportation of live stock from the points named therein to the yards of said company upon the tracks of said company in Chicago; and that the purpose and object of said provisions in said tariffs were that the charge therein laid for the transportation of live stock from the points therein named to the yards of said com-

pany upon the tracks of said company in Chicago was charged and collected solely and exclusively for the transportation of such live stock from the said points to the yards of said company upon the tracks of said company in Chicago; and that said charge of $2.00 per car laid in the said tariffs for the transportation and delivery of live stock beyond the tracks of said company to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transportating such live stock beyond the tracks of said company and delivering the same at the Union Stock Yards aforesaid, and said charge of $2.00 per car constituted the only charge and the only compensation for said last-mentioned service.

J. H. HILAND.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] W. D. MILLARD,
Notary Public, Cook County, Illinois.

(Endorsed:) Affidavit of Chicago, Milwaukee & St. Paul Railway Co. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

111 Thereafter and on the same day the following affidavit of J. R. Brice was filed of record in said cause, viz:

STATE OF ILLINOIS,
County of Cook, ss:

J. R. Brice, being first duly sworn, on oath says that he is the freight auditor of the Chicago, Milwaukee & St. Paul Ry. Co., one of the complainants herein, and as such is familiar with the method in which the accounts of said company are kept and have been kept for some years last past.

Affiant further says that attached to this affidavit, and marked "Exhibit A," is an original waybill issued in connection with a shipment to and delivery at the Union Stock Yards of said company, in Chicago; and affiant further says that the waybills issued by said company for many years last past in connection with the transportation of live stock delivered at the Union Stock Yards are similar to the waybill marked "Exhibit A" in this, that they show, as does "Exhibit A," the separate entering thereon of the freight charge for the transportation of the said live stock and the terminal charge aforesaid.

J. R. BRICE.

Subscribed in my presence and sworn to before me this 26th day of May, 1908.

[Notarial seal.] F. M. SMITH,
Notary Public, Cook County, Illinois.

(Endorsed:) Affidavit of Chicago, Milwaukee & St. Paul Railway Company. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

113 Thereafter and on the same day the following affidavit of Walter L. Ross was filed in said cause, viz:

STATE OF ILLINOIS,
County of Cook, ss.

Walter L. Ross, being duly sworn, on oath deposes and says that he is the general traffic manager of the Chicago and Alton Railroad Company, one of the complainants herein.

Affiant further says that attached to this affidavit, marked "Exhibit A," is a copy of the tariff of said company duly filed, issued and published according to law and now in force, showing the charge for the transportation of live stock.

Affiant further says that the provisions of the said tariff showing that the rates therein named apply only to the transportation of live stock from the points named to the tracks and yards of the company in Chicago, and that the terminal charge of $2.00 per car was made solely for the transportation of such live stock beyond the tracks of said company and to the Union Stock Yards in Chicago are the provisions which have been in tariffs issued for said company for a number of years last past, and since the year 1904.

Affiant further says that the said tariff provisions are construed by the officials of said company to mean and that the purpose and object of inserting the said provision in said tariff were that it should mean that the charge laid in said tariff of $2.00 per car for the transportation and delivery of live stock beyond the tracks of said company and to the Union Stock Yards in Chicago, was separated
114 and *ae*gregated from the charge laid in said tariffs for the transportation of live stock from the points named therein to the yards of said company upon the tracks of said company in Chicago; and that the purpose and object of said provisions in said tariffs were that the charge therein laid for the transportation of live stock from the points therein named to the yards of said company upon the tracks of said company in Chicago was charged and collected solely and exclusively for the transportation of such live stock from the said points to the yards of said company upon the tracks of said company in Chicago; and that said charge of $2.00 per car laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said company to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of said company, and delivering the same at the Union Stock Yards aforesaid; and said charge of $2.00 per car constituted the only charge and the only compensation for said last mentioned service.

WALTER L. ROSS.

Subscribed in my presence and sworn to before me this 27 day of May, 1908.

[Notarial seal.] ROBT. J. BELL,
Notary Public, Cook County, Illinois.

(Endorsed:) Affidavit of Chicago & Alton Railroad Company. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

121 STATE OF ILLINOIS,
County of Cook, ss.

W. D. Tucker, being first duly sworn, on oath says that he is the general auditor of the Chicago & Alton Railroad Company, one of the complainants herein, and as such is familiar with the method in which the accounts of said company are kept, and have been kept for some years last past.

Affiant further says that attached to this affidavit, and marked "Exhibit A," is an original waybill issued in connection with a shipment to and delivery at the Union Stock Yards of said company in Chicago; and affiant further says that the waybills issued by said company for many years last past in connection with the transportation of live stock delivered at the Union Stock Yards, are similar to the waybill marked "Exhibit A" in this, that they show, as does "Exhibit A," the separate entering thereon of the freight charge for the transportation of the said live stock and the terminal charge aforesaid.

W. D. TUCKER.

Subscribed in my presence and sworn to before me, this 27 day of May, 1908.

[Notarial seal.] ROBT J. BELL,
Notary Public, Cook County, Illinois.

(Endorsed:) Affidavit of Chicago & Alton Railroad Company. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

123 STATE OF ILLINOIS,
County of Cook, ss:

C. I. Sturgis, being first duly sworn, on oath says that he is the general auditor of the Chicago, Burlington and Quincy Railroad Company, one of the complainants herein, and as such is familiar with the method in which the accounts of said company are kept, and have been kept for some years last past.

Affiant further says that the moneys received by said company under the terminal charge of $2.00 per car for the transportation of live stock beyond the yards of said company upon the tracks of said company in Chicago, and to the Union Stock Yards in Chicago, is not now and has not for many years been entered upon the books and accounts of the said company as receipts from freight for the transportation of live stock, but, on the contrary, the same have been kept entirely separated and segregated upon the books of said company from the accounts of the moneys received by said company for the transportation of live stock from points of origin of the shipment to the yards of said company upon the tracks of said company in Chicago; that the moneys received for the transportation of live

stock of said company from the points of origin of the shipment to the yards of said company upon said company's tracks in Chicago have been kept in the accounts of said company as freight earnings, and the moneys received by said company under the terminal
124 charge aforesaid of $2.00 per car for the transportation of such live stock beyond the tracks of said company in Chicago, and to the Union Stock Yards aforesaid, have been entered in the accounts of said company as miscellaneous earnings or as switching earnings.

Affiant further says that attached to this affidavit and marked "Exhibit A" is an original waybill issued in connection with a shipment to and delivery at the Union Stock Yards of said company, in Chicago; and affiant further says that the waybills issued by said company for many years last past, in connection with the transportation of live stock delivered at the Union Stock Yards, are similar to the waybill marked "Exhibit A," in this: That they show, as does "Exhibit A," the separate entering thereon of the freight charge for the transportation of the said live stock and the terminal charge aforesaid.

C. I. STURGIS.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

J. H. PETTIBONE,
Notary Public, Cook County, Illinois.

* * * * * * *

126 STATE OF ILLINOIS,
County of Cook, ss:

George H. Crosby, being first duly sworn, on oath says that he is the freight traffic manager of the Chicago, Burlington & Quincy Railroad Company, one of the complainants herein.

Affiant further says that attached to this affidavit, marked "Exhibit B," is a copy of the tariff of said company duly filed, issued, and published according to law, and now in force, showing the charge for the transportation of live stock.

Affiant further says that the provisions of the said tariff showing that the rates therein named apply only to the transportation of live stock from the points named to the tracks and yards of the company in Chicago, and that the terminal charge of $2.00 per car was made solely for the transportation of such live stock beyond the tracks of said company and to the Union Stock Yards in Chicago, are the provisions which have been in tariffs issued for said company for a number of years last past, and since the year 1904.

Affiant further says that the said tariff provisions are construed by the officials of said company to mean and that the purpose and object of inserting the said provisions in said tariff were that it should mean that the charge laid in said tariff of $2.00 per car for the transportation and delivery of live stock beyond the tracks of said company and to the Union Stock Yards in Chicago was sepa-
127 rated and segregated from the charge laid in said tariffs for the

transportation of live stock from the points named therein to the yards of said company upon the tracks of said company in Chicago; and that the purpose and object of said provisions in said tariffs were that the charge therein laid for the transportation of live stock from the points therein named to the yards of said company upon the tracks of said company in Chicago was charged and collected solely and exclusively for the transportation of such live stock from the said points to the yards of said company upon the tracks of said company in Chicago; and that said charge of $2.00 per car laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said company to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of said company and delivering the same at the Union Stock Yards aforesaid, and said charge of $2.00 per car constituted the only charge and the only compensation for said last mentioned service.

GEORGE H. CROSBY.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] J. H. PETTIBONE,
Notary Public, Cook County, Illinois.

(Endorsed:) Affidavits of Chicago, Burlington & Quincy Rd. Co. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

204 Thereafter and on the same day the following affidavits of W. E. Bailey, C. B. Strohm, and J. E. Gorman were filed of record in said cause, viz:

STATE OF ILLINOIS,
County of Cook, ss:

W. E. Bailey, being first duly sworn, on oath says that he is the general auditor of the Atchison, Topeka and Santa Fe Railway Company, one of the complainants herein, and as such is familiar with the method in which the accounts of said company are kept and have been kept for some years last past.

Affiant further says that the moneys received by said company under the terminal charge of $2.00 per car for the transportation of live stock beyond the yards of said company upon the tracks of said company in Chicago, and to the Union Stock Yards in Chicago, is not now and has not for many years been entered upon the books and accounts of the said company as receipts from freight for the transportation of live stock, but, on the contrary, the same have been kept entirely separated and segregated upon the books of said company from the accounts of the moneys received by said company for the transportation of live stock from points of origin of the shipment to the yards of said company upon the tracks of said company in Chicago; that the moneys received for the transportation of live

stock of said company from the points of origin of the shipment to the yards of said company upon said company's tracks in Chicago have been kept in the accounts of said company as freight earnings, and the moneys received by said company under the terminal
205 charge aforesaid of $2.00 per car for the transportation of such live stock beyond the tracks of said company in Chicago, and to the Union Stock Yards aforesaid, have been entered in the accounts of said company as miscellaneous earnings or as switching earnings.

Affiant further says that attached to this affidavit, and marked "Exhibit A," is an original waybill issued in connection with a shipment to and delivery at the Union Stock Yards of said company in Chicago; and affiant further says that the waybills issued by said company for many years last past in connection with the transportation of live stock delivered at the Union Stock Yards are similar to the waybill marked "Exhibit A" in this, that they show, as does "Exhibit A," the separate entering thereon of the freight charge for the transportation of the said live stock and the terminal charge aforesaid.

W. E. BAILEY.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] J. L. COLEMAN,
Notary Public, Cook County, Illinois.

* * * * * * *

207 STATE OF ILLINOIS,
County of Cook, ss.

C. B. Strohm, being first duly sworn, on oath says that he is the agent and superintendent of terminals of the Atchison, Topeka and Santa Fe Railway Company, one of the complainants herein, and as such is familiar with the method in which the accounts of said company are kept, and have been kept for some years last past.

Affiant further says that attached to this affidavit, and marked "Exhibit A," is an exact copy of an original waybill issued in connection with a shipment to and delivery at the Union Stock Yards of said company in Chicago; and affiant further says that the waybills issued by said company for many years last past in connection with the transportation of live stock delivered at the Union Stock Yards, are similar to the waybill marked "Exhibit A," in this, that they show as does "Exhibit A," the separate entering thereon of the freight charge for the transportation of the said live stock and the terminal charge aforesaid.

C. B. STROHM.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] J. L. COLEMAN,
Notary Public, Cook County, Illinois.

* * * * * * *

209 STATE OF ILLINOIS,
County of Cook, ss.

J. E. Gorman, being first duly sworn, on oath says that he is the freight traffic manager of the Atchison, Topeka and Santa Fe Railway Company, one of the complainants herein.

Affiant further says that attached to this affidavit, marked "Exhibit A," is a copy of the tariff of said company duly filed, issued, and published according to law and now in force, showing the charge for the transportation of live stock.

Affiant further says that the provisions of the said tariff, showing that the rates therein named apply only to the transportation of live stock from the points named to the tracks and yards of the company in Chicago, and that the terminal charge of $2.00 per car was made solely for the transportation of such live stock beyond the tracks of said company and to the Union Stock Yards in Chicago, are the provisions which have been in tariffs issued for said company for a number of years last past.

Affiant further says that the said tariff provisions are construed by the officials of said company to mean and that the purpose and object of inserting the said provisions in said tariff were that it should mean that the charge laid in said tariff of $2.00 per car for the transportation and delivery of live stock beyond the tracks of said company and to the Union Stock Yards in Chicago, was separated and segre-
210 gated from the charge laid in said tariffs for the transportation of live stock from the points named therein, to the yards of said company upon the tracks of said company in Chicago; and that the purpose and object of said provisions in said tariffs were that the charge therein laid for the transportation of live stock from the points therein named to the yards of said company upon the tracks of said company in Chicago was charged and collected solely and exclusively for the transportation of such live stock from the said points to the yards of said company upon the tracks of said company in Chicago; and that said charge of $2.00 per car laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said company to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of said company and delivering the same at the Union Stock Yards aforesaid, and said charge of $2.00 per car constituted the only charge and the only compensation for said last-mentioned service.

J. E. GORMAN.

Subscribed in my presence and sworn to before me this 25th day of May, 1908.

[Notarial seal.] J. L. COLEMAN,
Notary Public, Cook County, Ill.

(Endorsed:) Affidavits of Atchison, Topeka and Santa Fe. Rd. Co. Filed May 28th, 1908. Henry D. Lang, clerk.

* * * * * * *

343 Thereafter and on the same day the following answer was filed of record in said cause, to-wit:

In the Circuit Court of the United States within and for the District of Minnesota.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of the Chicago Great Western Railway Company; Chicago Great Western Railway Company; Chicago, Burlington and Quincy Railroad Company; The Illinois Central Railroad Company; Chicago and Northwestern Railway Company; Chicago, Milwaukee and St. Paul Railway Company; the Chicago and Alton Railroad Company; The Chicago, Rock Island and Pacific Railway Company; and The Atchison, Topeka and Santa Fe Railway Company, complainants,

v.

THE INTERSTATE COMMERCE COMMISSION, defendant.

The answer of the Interstate Commerce Commission, the defendant herein, to the bill of complaint of the above-named complainants.

This defendant, the Interstate Commerce Commission, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had
344 or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer, answering saith:

I.

That this defendant is a bureau or department of the Government of the United States which was created and established and now exists under and by virtue of an act of the Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, as amended by subsequent acts, and particularly as amended by the act of June 29, 1906, and that the complainants are common carriers engaged in the interstate transportation of passengers and property wholly by railroad or partly by railroad and partly by water, and as such common carriers and in respect to such transportation are subject to the provisions of said act entitled "An act to regulate commerce," and said acts amendatory thereof and supplementary thereto.

II.

That by section 12 of said act this defendant is given authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and is required to keep itself informed as to the manner and method in which the same is conducted, and is "authorized and required to execute and enforce the provisions of the act;" and that among the provisions of the
345 act which this defendant is authorized and required to execute and enforce is the provision of section 1 thereof, requiring "all charges made for any services rendered or to be rendered in the transportation of passengers or property or in connection therewith to be just and reasonable," and forbidding every unjust and unreasonable charge for such service or any part thereof; and, also, the provisions of section 3 thereof, which declares that "it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

III.

That by section 13 of said act it is provided that, among others, any person, firm, corporation, or association may make complaint to this defendant by petition, briefly stating the facts, "of anything done or omitted to be done by any common carrier subject to the provisions of the act in contravention of the provisions thereof;" that a "statement of the charges thus made shall be forwarded" by this defendant "to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a
346 reasonable time, to be specified" by this defendant; that if such common carrier "shall not satisfy the claim, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty" of this defendant "to investigate the matters complained of in such manner and by such means as it shall deem proper;" and by section 14 it is provided that whenever an investigation shall be thus made by this defendant "it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of" this defendant, "together with its decision, order, or requirement in the premises."

IV.

That on December 3, 1906, in pursuance of and in strict conformity to the provisions of the law set forth in the preceding paragraph of this answer, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange made complaint to this defendant against the

railway companies, complainants herein, alleging violation of provisions of said act to regulate commerce, as hereinafter specifically set forth, and this defendant, after said complaint had been fully presented to it, both in the way of testimony and argument in behalf of both parties, and, after having investigated and considered the facts and questions presented, made a report in writing in respect thereto, setting forth in said report the material facts as found by this defendant from the testimony before it and the conclusion of this defendant therefrom, together with its order in question in
347 this case. (A copy of said report and order is hereto attached as Exhibit A, and a copy of the report of this defendant in another proceeding involving the same subject-matter between substantially the same parties is attached as Exhibit B hereto, and both are made parts hereof.)

V.

That prior to the year 1865 live stock was marketed in Chicago at several different points, and competition required the various railway companies bringing live stock to that market to deliver it, according to the wish of the shipper, at any one of these several points; that this involved expense and trouble, inasmuch as deliveries had often to be made at points off the lines of the various railways, and for the purpose of avoiding this a corporation, known as the Union Stock Yards and Transit Company, was organized by the railways, who took most of the stock and assumed the management of the corporation; that this company constructed the Union Stock Yards, consisting of chutes, pens, and the various appliances necessary for the unloading and marketing of live stock, and also built railroad tracks necessary to connect the various lines of railway engaged in the business with the Union Stock Yards, and entered into an arrangement with these railways by which they were to operate their own trains over the tracks of the Stock Yards Company to the stock yards without payment of other compensation than an unloading charge of 25
348 cents per car; that live stock thereafter shipped to Chicago was delivered at the Union Stock Yards as a matter of course, unless some other delivery for some special purpose or peculiar reason was directed, and the published rate to Chicago carried with it in all cases delivery at the stock yards; that this continued to be the case from 1865 up to June, 1894, when the Stock Yards Company imposed a charge for the use of its tracks leading from the terminals of the complainants to the stock yards, and said trackage charge so imposed ranged from 80 cents per car in some cases to $1.50 in others, the 80 cents charge being applied to most of the railways and the average charge being about $1 per car; and that for the alleged excuse afforded by the imposition of this average trackage charge of $1 the railway companies, June 1, 1894, exacted from the shippers $2 per car in addition to the through rates in force.

VI.

That the complaint made to the commission by the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange was based upon this additional charge of $2 and alleged that it resulted in making the entire through rate, which theretofore had embraced delivery at the stock yards, unjust and unreasonable, and this defendant found, as appears from its report (Exhibit A hereto), that the $2 additional charge was unjust and unreasonable, in so far as that charge exceeded the sum which the carriers were actually
349 obliged to pay in consequence of the trackage charge imposed by the Stock Yards Company, and that, the average sum which the complainants were obliged to pay for trackage being $1, that sum might be added without causing the existing rate to become unreasonable, and the order of this defendant (Exhibit A hereto) is in pursuance of this finding.

VII.

That this defendant prior to the issuance of the order in question in this case had, after due investigation as required by the law, made an order to the same effect in another proceeding involving the same questions and subject-matter, and the railway companies having refused to comply with said last-mentioned order, this defendant filed a petition in the Circuit Court of the United States for the Northern District of Illinois to compel compliance; that said Circuit Court refused to enforce the order and entered a decree dismissing said petition, and on appeal by this defendant to the Supreme Court that court affirmed the action of the court below (I. C. C. *v.* C., B. & Q. R. R. Co., 186 U. S., 320), on the ground that it appeared that since the charge of $2 was imposed the rates from a portion of the territory to which said last-named order of this defendant was applicable had been reduced and as so reduced were made less than they had been prior to the exaction of the $2 additional charge, and that, as this defendant did not designate or definitely define this territory from which the rates had been so reduced and its order was general,
350 operating upon all the cariers in the whole territory covered by the complaint, it could not be enforced as to any of said territory; that in affirming the action of the lower courts in dismissing defendant's petition the Supreme Court says:

"We think, however, * * * that nothing in the decree refusing to execute the order of the commission should be construed as preventing that body, if it deems it best to do so, from hereafter commencing proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory to which the reduction referred to in the opinion, if any such there be, did not apply. (186 U. S., 342.)"

That under the leave thus granted, the said complaint of the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange, which resulted in the order in question in the present case,

was filed before this defendant and this defendant in its report and opinion (Exhibit A hereto), upon which said order is based, meets the view of the Supreme Court by designating the territory to which the reduction in rates applied.

VIII.

That while the Supreme Court on the ground set forth in the preceding paragraph of this answer refused to reverse the action of the courts below and decree the enforcement of the order of the commission, it sustained the commission on all the material grounds
351 upon which the commission based said order; that the commission held that the fact that the complainants from 1865 to 1894, a period of twenty-nine years, transported the stock to the stock yards without any additional charge for continuing the transportation from their own terminals over the tracks of the Stock Yards Company to the stock yards, justified the presumption that the through rate was intended to cover and did cover this extra expense, and the Supreme Court sustains this finding of the commission, saying:

"There is no room for question that during the many years these rate sheets were enforced, the carriers, under their contracts to carry to Chicago, delivered carloads of cattle to the stock yards without making any charge other than that which was specified in the through rate. Under these circumstances, in the absence of proof, can it be assumed that the carriers were, for the many years in question, gratuitously performing the terminal service? That such assumption may not be indulged in results from the ruling in Covington Stock Yards *v.* Keith, 139 U. S., 128, where it was decided that as for a through rate to a given point the carrier contracted to deliver at that point, the presumption was that the through rate included adequate compensation for the services rendered at the point of delivery. (186 U. S. 336.)"

That said court further sustained this defendant in its finding that the exaction by the Stock Yards Company of a trackage
352 charge averaging $1 did not justify the exaction by the complainant railway companies of $2 therefor, saying:

"It needs no reasoning to demonstrate that the commission correctly held that the mere imposition by the Stock Yards Company of a new burden averaging $1 per car did not justify an additional charge by the carriers of $2 per car. (186 U. S., bottom p. 337, top p. 338.)"

That said court also sustained the finding of this defendant that the through rate to the terminals at Chicago on the lines of complainants charged prior to 1894 included compensation for the service rendered in transporting the stock from said terminals to the stock yards and that the charge of $2 was in addition to the through rate which had theretofore been charged, saying:

"The entire previous through rate was maintained and a memorandum was placed upon the schedules to the effect that thereafter an additional charge of $2 for delivering at the stock yards would

be exacted. This was a mere addition to the sum of the terminal charge embraced in the prior through rate. We think that it can not be said that to add an additional amount to the former charge was necessary to divide such former charge without holding that to add one sum to another is necessary to divide the other. (186 U. S., top p. 337.)"

353 IX.

Defendant denies the allegation in the bill of complaint that "said charge of $2 per car was the sole and only charge and compensation made or received by complainants for the service of transporting the said cars of live stock beyond the lines of their respective roads and making delivery of the same in the said Union Stock Yards; and that said charge of $2 per car for said service was segregrated from and entirely separate from the charge in the tariffs for the transportation of said live stock from the point of origin of the shipment to a delivery point on the tracks of the complainants in the city of Chicago," and defendant alleges that as found by the Supreme Court the said charge of $2 was a "mere addition to the sum of the terminal charge embraced in the prior through rate;" that the through rate enforced from 1865 to 1894 covered compensation for the entire service from the point of origin of the live stock shipments to the stock yards; that delivery at the stocy yards was a necessary incident of the contract to carry live stock to Chicago; that the allegation of complainants that the $2 charge is not adequate to cover the cost for the terminal service rendered in making delivery at the stock yards is, if true, a circumstance showing that it was not imposed for that purpose and that the through rate was intended to cover and does cover that expense; that in the language of this defendant in its report (Exhibit A hereto), "segregation is one thing and addition is another, and what the complainants did was to make an arbitrary addition
354 to the previous rate, by charging $2 per car more for bringing exactly the same freight and performing exactly the same service as before;" that complainants can not by setting forth in their tariffs a statement that said $2 charge was for the "special and separate service" of transporting the live stock from their respective roads to the stock yards alter the fact as herein alleged and as found by the Supreme Court and this defendant; and defendant denies all the allegations in said bill of complaint inconsistent or in conflict with the foregoing allegations in this Paragraph IX of this answer.

X.

Defendant denies that the complainants have adequate, if any, terminal facilities for live stock in Chicago, to which live stock is shipped upon the rates from points of origin to Chicago; and alleges that, as found by this defendant in its report (Exhibit A hereto), some of the complainants, about June 1, 1894, the date of the imposition of the $2 charge, "provided in a very limited way such facilities

at various points in and around Chicago, but that in no case were these facilities adequate to the handling of any considerable number of animals; that the complainants perfectly understood that shippers could not avail themselves of these facilities, and the only purpose in providing them was to give color to the claim that they had in the vicinity of Chicago some live-stock depots other than the Union Stock Yards;" that the rate in force June 1, 1894, was sufficiently high to include delivery at the stock yards, if no trackage charge had been imposed by the Stock Yards Company; that there has been no increase in the expense of the service from the terminals of the complainants to the stock yards, except by reason of the imposition of the trackage charge, and that the total cost to the complainants of delivering live stock at the Union Stock Yards, including the trackage charge, is not much, if any, above one-half the average cost of handling all carload freight in the city of Chicago.

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XI.

That cattle from much of the territory involved in this case can be marketed at several different points, like Chicago, St. Louis, Kansas City, and Omaha, and the rate is an important factor in determining to which of these markets they shall be sent; that for many years previous to 1894 a certain relation in rates had been maintained between these markets, and if any change was made to one market a corresponding change was ordinarily made to all others; that when the $2 charge involved in this case was imposed at Chicago no similar charge was made elsewhere, and the cost of transporting live stock to Chicago was increased by that amount while not so increased to these other competitive markets, and that this was and is an undue preference of said other markets and an unjust discrimination against Chicago, subjecting that city to an undue prejudice or disadvantage.

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XII.

That the charge of $2 involved in this case was the result of a contract or combination between complainants, and that said contract or combination was in restraint of trade or commerce within the meaning of the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," popularly known as the "Sherman anti-trust law," and was unlawful under said act; and that the complainants, for this and other reasons, do not come before this court clean handed, and their bill of complaint should be dismissed.

XIII.

That this defendant, by reason of the experience of its members in this kind of controversy and their great opportunity for full in-

formation, is, as to questions arising under the commerce acts, held by the courts to be an expert tribunal; that this defendant is also a quasi-judicial tribunal, and its conclusions in this case, and in all cases under said acts, are not the result of ex parte proceedings or investigations, but are the result of investigations strictly judicial; and that the conclusions of this defendant so arrived at are to be held to be prima facie correct, and should not be set aside by the courts except in a clear case of error.

XIV.

That the burden is upon the complainants to show clearly to the satisfaction of this court that the order of the commission in
357 question is erroneous and should not be enforced, and it is not sufficient to raise a mere doubt in the mind of the court; that the bill of complaint in this case does not set forth, or in any way make a part thereof, the report and opinion of this defendant or the evidence introduced on the hearing before this defendant, and upon which the conclusions and order of this defendant are based, and does not allege or show that said order is not justified by the weight of said evidence, and that there is no allegation in the bill of complaint herein that the complainants have discovered or are prepared to adduce any new testimony or testimony in addition to that adduced before this defendant.

XV.

That the order of the commission in question allows the complainants $1 in addition to what they had charged for the 29 years preceding the imposition of the $2 charge imposed June 1, 1894; that said allowance of $1 covers the average trackage charge made by the Stock Yards Company, and the charge of $2 renders the through rate excessive and unduly discriminatory; that no irreparable or material injury can result from the enforcement of said order, and that the rule is well settled by the courts that "an injunction should never be granted except in a clear case of irreparable injury and with a full conviction on the part of the court of its urgent necessity." (High, Vol. I, 36.)

358 XVI.

This defendant denies all the material allegations of said bill of complaint inconsistent with the allegations set forth in the foregoing paragraphs of this answer from Paragraph I to Paragraph XIII thereof, both inclusive, and now, having fully answered the said bill of complaint in so far as it is advised the same is material and necessary to be answered, denies that the complainants herein are entitled to the relief, or any part thereof, in said bill of complaint demanded, or any relief whatsoever; claims the same advantage of this, its answer thereto, as if it had demurred to said bill of com-

plaint, and prays to be hence dismissed with its reasonable charges in this behalf wrongfully sustained.

THE INTERSTATE COMMERCE COMMISSION,
By EDW. A. MOSELEY,
Secretary thereof, thereunto duly authorized.

WASHINGTON,
District of Columbia, ss:

Edw. A. Moseley, being first duly sworn, says on oath that he knows the contents of the foregoing answer, and that the facts stated therein are true to the best of his knowledge, information, and belief.

[Interstate Commerce Commission seal.] EDW. A. MOSELEY,

Subscribed and sworn to before me this the 23rd day of May, A. D. 1908.

[Notarial seal.] H. S. MILSTEAD,
Notary Public.

359 EXHIBIT A.

360 THE CATTLE RAISERS' ASSOCIATION OF TEXAS AND the Chicago Live Stock Exchange
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago, Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company; and Illinois Central Railroad Company. } No. 939.

Submitted June 26, 1907. Decided October 21, 1907.

Upon the facts and circumstances disclosed by the record, Held, that the terminal charge of $2 per car exacted by defendants for the delivery of live stock at the Union Stock Yards in Chicago with respect to shipments from points without the State of Illinois is unjust and unreasonable and unduly discriminatory, and that such charge should not exceed $1 per car.

Held, further, that the decree of a court dismissing a bill brought to enforce an order of the commission made previous to the amendment of June 29, 1906, is not a bar to the right of the commission to examine with respect to a date subsequent to June 29 the same rate involved in that proceeding.

Cowan and Burney for the Cattle Raisers' Association of Texas.
S. H. Cowan for the Chicago Live Stock Exchange.
Ed. Baxter for defendants.

REPORT AND ORDER OF THE COMMISSION.

PROUTY, Commissioner:

The subject of this complaint is the so-called terminal charge of $2 per car imposed by the defendants for the delivery of carloads of live stock at the Union Stock Yards in Chicago. This matter has been before the commission in one form and another for the last ten years. Much testimony has been taken, much discussion
361 had, and four reports prepared. These reports treat the subject in every detail, and it would not be profitable, nor is it needful, to repeat those details here. A brief statement of the case is necessary to an understanding of the question to be decided.

Previously to about 1865 live stock was marketed in Chicago at several different points, and competition required the various railway companies bringing live stock to that market to deliver it, according to the wish of the shipper, at any one of these several points. This was expensive and annoying, since deliveries must often be made at points off the lines of the various railways, and for the purpose of avoiding it the following arrangement was adopted:

A corporation known as the Union Stock Yards & Transit Company was organized by the railways, who took most of the stock and assumed the management of the corporation. This company constructed the Union Stock Yards, consisting of chutes, pens, and the various appliances necessary for the unloading and marketing of live stock. The Union Stock Yards & Transit Company also built the railroad tracks necessary to connect the various lines of railway which then reached Chicago with the Union Stock Yards, and entered into an arrangement with these railways by which they were to operate their own trains over the tracks of the Stock Yards Company to the stock yards without the payment of other compensation than an unloading charge of 25 cents per car. While this was the understanding, there was no contract for a definite term to that effect.

The purpose of this was to establish a single market for the sale and delivery of live stock in the city of Chicago, and the result was exactly as desired. The other markets were all abandoned; slaughterhouses were located in the vicinity of these stock yards, and the Union Stock Yards thus became the sole place in the city of Chicago where cattle and hogs were marketed for slaughter. It was also the principal market for horses and mules. Live stock shipped to Chicago was delivered at the Union Stock Yards as a matter of course, unless some other delivery for some special purpose or peculiar reason was directed. One of the defendants for certain local reasons had unloading chutes and pens of limited capacity in another part of the city where stock for through shipment could be fed and watered; but aside from this the defendants had no facilities of their own worth the name in the city of Chicago. The published rate to Chicago carried with it in all cases delivery at the Union Stock Yards.

As time went on, the different railroad companies which had at first owned a controlling interest in the Union Stock Yards and Transit

Company parted with their stock holdings, so that, in the year 1894, while a majority of the directors of that company were
362 still representatives of various railway interests, the control of the company had entirely passed from their hands. In the spring of that year the Stock Yards Company announced its intention of imposing a charge for the use of its tracks leading to the stock yards. This purpose was earnestly resisted by the railways without avail, and a charge of 80 cents in some cases and $1.50 in other per car was exacted for the use of the tracks leading to the stock yards.

When the railways became convinced that they must pay this trackage imposition they in turn imposed upon the shipper a charge of $2 per car for delivering carloads of live stock at the Union Stock Yards. The tariffs fixing this charge were duly filed and posted and the charge itself became effective on June 1, 1894.

Agents at receiving points previous to this time had sent stock to the stock yards when consigned to Chicago without further direction. They now inquired of the shipper whether he desired his stock shipped to Chicago or to the Union Stock Yards. Since there was but one stock market in Chicago, and since the only practicable way of reaching that stock market was by transfer of the stock in the car to the stock yards, the shipper must of necessity elect to have the shipment delivered at the Union Stock Yards, and thereupon this additional charge of $2 was imposed.

Previous to June 1, 1894, none of the defendants, with one exception, had unloading facilities which would accommodate any considerable quantity of stock in the city of Chicago. Some of them about this time provided in a very limited way such facilities at various points in and around Chicago, but in no case were these facilities adequate to the handling of any considerable number of animals. The railways perfectly understood that shippers could not avail themselves of these facilities, and the only purpose in providing them was to give color to claim that they had in the vicinity of Chicago some live stock depot other than the Union Stock Yards. Several of the defendants did not even make this pretense.

It will be noticed that every incident of the transportation was precisely the same after June 1, 1894, as it had been before that date. The stock was received, transported, and delivered in exactly the same manner. The cost to the railway was exactly the same, except for the payment of this trackage charge. The engines and crews of the defendants still hauled this live stock to the stock yards precisely as they had in the past. The sole result of the imposition of this terminal charge was to increase the cost to the shipper by $2 per car while the service remained identically what it had been.

In 1896 the Cattle Raisers' Association of Texas, one of the complainants in the present case, a voluntary association of persons interested in the raising and shipping of cattle from Texas and from many other States and Territories, filed with the commission a
363 petition attacking the lawfulness of this terminal charge. Soon after the commencement of that proceeding the Chicago

rate for the transportation of live stock to Chicago, naming one rate gaged in selling on commission cattle at Chicago, intervened in favor of the complainant. The defendants claimed, upon the strength of Walker v. Keenan, 73 Fed. Rep., 755, that they might segregate their rate for the transportation of live tock to Chicago, naming one rate for the service up to Chicago and a second charge for a delivery to the stock yards. The commission admitted the authority of Walker v. Keenan, as applied to the case under consideration, without approving the general principle that terminal charges should be named separate from other charges for transportation, but held that segregation was one thing and addition another. What the railways had done in this case was not to separate the rate upon this live stock, but to make an arbitrary addition to the previous rate. They were charging $2 per car more for bringing exactly the same freight and performing exactly the same service as before. The commission was of the opinion that the amount charged previous to June 1, 1894, had been a fair and reasonable compensation for this service and that the addition of this $2 charge was unjust and unreasonable.

The cost of rendering this service had, however, been increased by the amount of the trackage charge exacted by the Union Stock Yards & Transit Company, and it was the opinion of the commission that the carriers might properly increase their rate correspondingly. This charge was 80 cents in some cases and $1.50 in others, but competitive conditions were such that all the defendants must make the same terminal charge. To have allowed each railway to impose a charge equal in amount to the trackage charge paid by it and no more would have compelled all the defendants to reduce this charge to 80 cents per car, although many of them paid $1.50. Under these circumstances it seemed just to permit the making of a charge of $1 by all the defendants, and such was the conclusion reached. Cattle Raisers' Association of Texas et al. v. Fort Worth & Denver City Ry. Co. et al., 7 I. C. C. Rep., 513.

Upon the promulgation of this decision the defendants moved for a rehearing, which was denied. 7 I. C. C. Rep., 555a.

The commission entered an order in accordance with its conclusion, which the defendants declined to obey, and thereupon suit was brought to enforce the same, which finally resulted in a decision by the Supreme Court of the United States directing that the petition be dismissed. Interstate Commerce Commission v. Chicago, Burlington & Quincy R. R. Co. et al., 186 U. S., 320.

The Supreme Court held that the commission was warranted in finding that the handling of carloads of live stock to the stock yards had not been a gratuity previous to June 1, 1894, and that the
364 imposition of the $2 terminal charge without any justification was unlawful. The report of the commission stated that after the imposition of the $2 charge rates from certain territory involved had been reduced by an amount exceeding the amount of the terminal charge and did not state the reason for the reduction nor define the territory to which it applied. Since the total through rate, including

the terminal charge from this territory, would be less after this reduction than it had been before the addition of the $2 charge, the court was of the opinion that, in the absence of any showing as to the cause of the reduction, the total rate, including the terminal charge, must be considered reasonable from territory affected by the reduction; and further, since there was nothing in the case from which that territory could be defined, it was impossible to enforce the order of the commission as to any territory.

After the promulgation of this decision the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange, the complainants in the present proceeding, filed a petition with the commission setting forth that rates from that territory from which reductions had been made in 1896 had been advanced and were then higher than before June 1, 1894. This petition prayed that the commission would reopen the case, define this territory, and order the carriers to desist from the imposition of the terminal charge from that and from all other territory.

The defendants insisted that by the decree dismissing the bill of the commission to enforce its order the whole case was finally ended and that nothing further could be done in that proceeding.

The Supreme Court, at the conclusion of its opinion, had used the following language:

"It follows that the decree of the circuit court of appeals, which affirmed the decree of the circuit court, refusing to command compliance with the order of the commission, was right, and it must therefore be affirmed. We think, however, in view of what has been said, and in order to prevent all possible misconception, that it should be stated that nothing in the decree refusing to execute the order of the commission should be construed as preventing that body, if it deems it best to do so, from hereafter commencing proceedings to correct any unreasonableness in the rate resulting from the additional charge as to any territory to which the reduction referred to in the opinion, if any such there be, did not apply."

The commission held that with respect to the territory covered by the reductions of 1896 no further steps could be taken in that proceeding, but that with respect to all other territory, by the very words of the opinion of the Supreme Court, further steps might be taken, and we were of the opinion that it was within our discretion to determine whether these further proceedings should be had upon a new petition or by a continuation of the former suit. We accordingly reopen that case as to all territory except that covered
365 by the reductions of 1896, with leave to all parties to introduce such further testimony as they might desire. Cattle Raisers' Asso. of Texas et al. v. Chicago, Burlington & Quincy R. R. Co. et al., 10 I. C. C. Rep., 83.

Upon the original trial no testimony had been introduced touching the reasonableness of rates upon live stock to Chicago before or after the imposition of the terminal charge. Upon the rehearing much testimony to that point was produced by both parties. The

defendants sought to show that such rates had, before June 1, 1894, become unduly low, so that even after the imposition of the $2 charge they were still reasonable; and they further claimed that if this were not the case previous to that date such rates had since, owing to reductions and to increased cost of operation, become so unremunerative that the addition of this charge was justifiable. The complainants, upon the other hand, insisted that the rates were sufficiently high before June 1, 1894; that advances rather than reductions had been the rule since then, and that while the cost of operation had increased, this had been more than offset by the increase of traffic.

The commission found that rates on June 1, 1894, were sufficiently high to include a delivery at the stock yards, if no trackage charge had been imposed by the Stock Yards Company; that while rates subsequent to that date had been sometimes advanced and sometimes reduced, these changes had been made for other reasons and had no reference to the terminal charge; that live-stock rates had been at all times since June, 1894, and were then, sufficient to include a delivery at the stock yards, and that the imposition of this charge was unlawful, except in so far as it was justified by the increased cost of service owing to the trackage charge. The defendants were therefore ordered to desist from imposing the $2 charge with respect to all territory except that from which the reductions of 1896 had applied, which was defined in the eport of the commission.

This report was made August 16, 1905. Cattle Raisers' Association of Texas et al. v. Chicago, Burlington & Quincy R. R. Co. et al., 11 I. C. C. Rep., 277. No proceedings have ever been begun for the enforcement of the order then entered.

On December 3, 1906, the complainants, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange, filed their petition in the present proceeding, setting up the facts hereinbefore stated, alleging that the imposition of the $2 terminal charge had been and still was unlawful under the first section of the act, because unjust and unreasonable, and a discrimination in violation of the third section, inasmuch as this charge was imposed at Chicago while not imposed under similar conditions at rival markets, and praying
366 that the commission would order the carriers to desist from making any terminal charge whatever, or, if in its opinion some charge might be made, then, that it would fix the amount of that charge.

The manifest purpose of this new proceeding was to gain the benefit of the increased authority conferred upon this commission by the amendments of June 29, 1906.

Under stipulation of parties all the testimony taken in the former proceedings is before us, and considerable additional testimony has been introduced in this proceeding. The issues are the same as heretofore, and the cause has been argued and submitted by counsel upon the same general lines.

We see no reason to change our former holding in this matter. We are of the opinion that live-stock rates from points in other States and Territories to Chicago over the lines of the defendants are sufficiently high to include a delivery at the Union Stock Yards, save for the trackage charge exacted by the Stock Yards Company, and that the imposition of the $2 terminal charge for such delivery is unjust and unreasonable. In view of this trackage charge as applied to competitive conditions at Chicago, we are of the opinion that these defendants may reasonably impose a charge of $1 per car and not more.

The complainants insisted that this entire charge ought to be condemned by the commission, for the reason that the defendants, even though required to make payment for the use of the tracks of the Stock Yards Company, nevertheless make deliveries of this live stock at the stock yards cheaper by far than they deliver other carload freight in the city of Chicago.

The original case did not show the cost of making delivery of other kinds of carload freight at this market, but the present record shows that the average cost to one defendant, the Atchison, Topeka & Santa Fe Railway Company, of delivering all kinds of carload freight, including live stock, is $5.40 per car, while the cost of delivering live stock is not far from $2 per car. The testimony further indicates that the average cost of delivering all kinds of carload freight does not differ much in the case of the Sante Fe from that in the case of the other defendants, although it does appear that several of the defendants are at greater expense than $2 per car in making delivery of live stock at the stock yards. We think it fairly appears upon this record that the total cost to these defendants of delivering live stock at the Union Stock Yards, including the trackage charge, is not much, if any, above one-half the average cost of handling all carload freight in the city of Chicago.

There is, therefore, some force in the suggestion of the complainants, but inasmuch as these rates had been adjusted previous to June 1, 1894, upon the basis of a delivery at the stock yards, we
367 think these carriers may fairly impose a charge which will, on the average, recoup them for the additional expense of delivery entailed by this charge of the Stock Yards Company.

As already said, the defendants insisted in the former case that this whole matter had become res judicata by the dismissal of the petition brought to enforce the order of the commission, and they entered a special appearance under benefit of this claim in all proceedings subsequent to that decision. Some, and perhaps all, of these defendants claim that this suit upon the same subject-matter is for the same reason barred.

It would seem plain that proceedings before this commission can not be made the subject of judicial estoppel. The decision of a court once made is final, because, for one reason, the facts upon which that decision rests are always the same; but the facts upon which controversies before this body are determined vary from day to day. A

rate, regulation, or practice may be unreasonable now, although a year ago it was entirely reasonable.

This commission has held that while it will not, ordinarily, reexamine a matter which has been fully heard and passed upon unless changed conditions are shown, this is for reasons of convenience and not because of any legal requirement. Railroad Commission of Kansas v. Atchison, Topeka & Santa Fe Ry. Co., 8 I. C. C. Rep., 304, 308; Cattle Raisers' Association of Texas v. Chicago, Burlington & Quincy R. R. Co. et al., 10 I. C. C. Rep., 83, 106. The Supreme Court of the United States has apparently declared that the determination of a rate for the future, which is the function exercised by the commission in this proceeding, is legislative rather than judicial. Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S., 479.

Exactly what the effect might be upon the right of the commission to reexamine at some subsequent time a particular rate if the court, upon proceedings for that purpose, should restrain the enforcement of an order of the commission putting in a substitute for that rate is not considered. We hold that a decree dismissing the bill brought to enforce an order of this commission made previous to the amendment of June 29, 1906, is not a bar to the right of the commission to examine with respect to the present time the same rate involved in that proceeding.

It may be noticed that this question can not arise as to most of the rates involved here. The Supreme Court, in dismissing the petition of the commission, expressly stated that its action should not prevent the taking of subsequent steps with respect to all territory not covered by the reductions of 1896. The defendants objected to a reopening of the original case, since that was not a "beginning" of pro-
368 ceedings, but the present suit is strictly a new proceeding and not, therefore, obnoxious to that objection.

The only territory about which the question can arise is that covered by the reductions of 1896, referred to in the opinion of the Supreme Court. In order that the court may now have before it the necessary information upon which to modify our order, if erroneous for this reason, we here define that territory, which was as follows:

The entire State of Texas north and west of the Galveston, Harrisburg & San Antonio Railway and the Houston, East & West Texas Railway, including stations on the former and excluding those on the latter; also all stations in Indian Territory and Oklahoma Territory upon the Missouri, Kansas & Texas Railway, the Rock Island system, including the St. Louis & San Francisco Railroad and the Atchison system.

These reductions were made October 1, 1896, and were, as a rule, 5 cents per 100 pounds. In February, 1899, rates from this same territory were generally advanced 2½ cents per 100 pounds, and in December of the same year there was a second advance of 3 cents, making a total advance of 5½ cents per 100 pounds and leaving in effect a rate somewhat higher than before the reduction of 1896. In the spring of

1903 these rates were again increased 3 cents per 100 pounds, and this is the rate now in effect.

There is another phase of this matter. Cattle from much of the territory involved can be marketed at several different points, like Chicago, St. Louis, Kansas City, and Omaha, and the rate is an important factor in determining to which of these markets they shall be sent. For many years previous to 1894 a certain relation in rates had been maintained between these markets. If any change was made to one market, a corresponding change was ordinarily made to all others. When this $2 charge was imposed at Chicago no similar charge was made elsewhere, and the cost of transporting live stock to Chicago was increased by that amount, as compared with these other competitive markets. The complainants insist that this was an undue discrimination against Chicago.

We held, in City Council of Atchison v. Missouri Pacific Ry. Co. et al., 12 I. C. C. Rep. 127, that where the defendants had for a long time treated certain Missouri River points as entitled to common rates and facilities and had thereby built up grain markets at these points, they must afford at one the same services in handling grain which they accord at others. Upon the same principle these carriers must not, in the absence of some justifying excuse, impose a terminal charge at Chicago and not at other markets; and we are further of the opinion that it is incumbent upon the defendants to show what that justification is, when, for the first time after many years,
369 the apparent discrimination is created. The record discloses, as we have found, a sufficient reason for imposing a charge of $1, but, in your opinion, anything beyond that works an undue discrimination against Chicago as a live-stock market, in favor of Kansas City, St. Louis, and Omaha.

All questions as to reparation are reserved for further proceedings.

CLARK and HARLAN, Commissioners:

We are not able to agree with the reasoning or the conclusions of the majority opinion in this case.

ORDER.

Upon the foregoing report—

It is ordered that the defendants, the Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago, Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company; and Illinois Central Railroad Company, be, and they are hereby, required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car.

It is further ordered that said defendants be, and they are hereby, notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the State of Illinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them.

371 EXHIBIT B.

CATTLE RAISERS' ASSOCIATION OF TEXAS, complainant, and The Chicago Live Stock Exchange, intervener,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago, Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company; Wabash Railroad Company; and Illinois Central Railroad Company. } No. 466.

Decided August 16, 1905.

1. A railroad company may maintain its live-stock depot at a particular point, although it neither builds nor repairs nor insures the stock pens into which the stock is unloaded, and does not hire or control the men who do the unloading; and whether the Union Stock Yards at Chicago have been, in railroad phraseology or in legal definition the depot of defendants is immaterial, for they were, and still are, in fact the point to which the stock is transported and unloaded under the shipping contract of defendants.
2. Excluding the territory covered by the reduction of 1896, which is described in the findings, live-stock rates to Chicago participated in by defendants were on May 31, 1894, reasonable compensation for the service performed, including delivery at the Union Stock Yards in Chicago. At all times since that date such rates have been, and now are, sufficiently high to include a delivery at the stock yards as such delivery was made prior to June 1, 1894. While since that time there have been advances and reductions from some points, they have been about equal, averaging probably less than one cent per 100 pounds and the great majority of rates remain the same as they were on May
372 31, 1894. These scattered reductions, as well as the advances,

applied variously, some on cattle, some on sheep, and others on hogs. No change in the rate has been made to offset the addition of the terminal charge in Chicago of $2.00 per car, or with any reference to such charge. The imposition of any such terminal charge, except in so far as the cost of delivery in Chicago has been increased by the trackage charge paid by defendants to the Stock Yards Company, since June 1, 1894, is unreasonable. Such increased cost of delivery, that is to say, such trackage charge, is fairly estimated for all the defendants at one dollar per car. Citing and applying Interstate Commerce Commission v. Chicago, Burlington & Quincy R. Co., 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824, Held:

First: That delivery to the Union Stock Yards prior to June 1, 1894, was included in the rate and was in no sense a gratuity.

Second: That outside of the excluded territory, a terminal charge for delivery to the Union Stock Yards in Chicago of one dollar per car is reasonable, and defendants' terminal charge of two dollars per car, exacted since June 1, 1894, is unreasonable.

Third: That the case be retained for further proceedings in the matter of reparation.

S. H. Cowan for complainant and intervener.

Ed Baxter for defendants.

C. A. Severance and Frank B. Kellogg for Chicago Great Western Railway Co.

Francis H. Lynde for Chicago & Northwestern Railway Co.

Robert Dunlap for Atchison, Topeka & Santa Fe Railway Co.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, Commissioner:

This is the fourth report which the commission has had occasion to make in this matter and in order to understand the questions presented for consideration now a brief history of the case is necessary.

On June 1, 1894, the railways entering the city of Chicago imposed a charge of $2.00 per car for the delivery of live stock at the Union Stock Yards. September 1, 1896, the Cattle Raisers' Association of Texas filed a complaint alleging the unlawfulness of this terminal charge, and on March 10, 1897, the Chicago Live Stock Exchange intervened in favor of the complainant. The original
373 complaint only put in issue the lawfulness of this terminal charge when applied to shipments of cattle from certain territory, but the intervening petition attacked the charge as to all live-stock shipments delivered at the Union Stock Yards by the above defendants, who have answered that petition.

After investigation the commission, on January 20, 1898, published its report and opinion holding that the charge was unreasonable to the amount of $1.00 per car, and stating that an order would be made

requiring the defendants to cease and desist from continuing to impose the charge of $2.00, 7 I. C. C. Rep. 513. Subsequently the defendants filed a motion for rehearing, which, after further argument, was denied August 4, 1898, 7 I. C. C. Rep. 555a; and thereupon an order was made pursuant to the original opinion, the question of reparation being reserved for future consideration. The defendants having refused to obey the order, legal proceedings were instituted for its enforcement which finally resulted in the affirmance by the Supreme Court of the United States of the decree of the Circuit Court dismissing the petition of the commission, Interstate Commerce Commission *v.* Chicago, B. & Q. R. Co., 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824, but with this qualification:

Previous to June 1, 1894, live stock had been delivered by the defendants at the Union Stock Yards at the Chicago rate. In making such delivery the various defendants had operated their trains over the tracks of the Stock Yards Company without charge to them by that company. On June 1, 1894, the Stock Yards Company imposed for the first time a trackage charge which amounted in some cases to 80 cents per car, and in other cases to $1.50 per car, whereupon the defendants had imposed this charge of $2.00 per car. The commission held that the expense of delivery at the stockyards had, previous to June 1, 1894, been included in the Chicago rate; that this expense to the carriers was increased by the action of the Stock Yards Company on the average $1.00 per car, and that, therefore, the defendants might properly increase their own charges $1.00 per car; but that in imposing $2.00 they exceeded what was just and reasonable by the amount of $1.00.

374 In 1896 live stock rates from certain of the territory complained of had been reduced 5 cents per hundred pounds, amounting to from $10 to $12 per car, and this fact was stated in the report of the commission. The Supreme Court held that the commission was right in its conclusion that the expense of delivery had been previously included in the through rate, and that the defendants were not justified in imposing the additional charge of $2.00 when the expense to them had only been increased by $1.00; that, therefore, the entire rate which the shipper was compelled to pay was $1.00 too high; but, inasmuch as the rates from certain territory had been reduced by an amount much greater than the addition made by the terminal charge, the court was of the opinion that the total rate was still sufficiently favorable to the shipper; and, since the report of the commission left it doubtful whether this reduction of 5 cents applied to all the territory in question, or if it applied to a part only did not definitely define that part, the court could not enforce the order of the commission as made, but was compelled to affirm the decree declining to enforce the order. The court stated, however, in concluding its opinion, that its decision and consequent decree were to be without prejudice to the right of the commission to subsequently proceed with respect to that territory to which the reductions did not apply, if such there was.

On February 28, 1903, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange filed a petition asking the commission to proceed with the matter of reparation, and also to reopen the case with a view to defining the territory to which the reduction of five cents per hundred pounds did not apply, and making an order in respect to that territory. This petition was granted, and the defendants notified to file such answers in the premises as they might desire. It had appeared in the original case that only the defendants whose lines entered Chicago were interested in the imposition of this $2.00 charge, and accordingly the original order of the commission had been directed against only these defendants. The
375 petition for a reopening of the case only included these same railways, which were the Chicago, Burlington & Quincy; the Chicago Great Western; the Chicago & Northwestern; the Chicago, Milwaukee & St. Paul; the Chicago & Alton; the Chicago, Rock Island & Pacific; the Atchison, Topeka & Santa Fe; the Wabash; and the Illinois Central.

The defendants, instead of answering, filed a motion to vacate the order of the commission to proceed with the matter of reparation and to reopen the case. They contended that the affirmance of the decree finally dismissing the petition of the commission to enforce its order to cease and desist from imposing the terminal charge concluded all proceedings of every nature whatsoever in the original case; that no reparation could be had and no further steps taken in that case to compel the carriers to desist from imposing this terminal charge. The commission, after having fully heard the parties and considered the matter, decided, first, that the matter of reparation was not connected with nor controlled by the order to cease and desist; that in the report which led up to the making of that order the commission had expressly reserved the subject of reparation for further consideration; and that while a decision upon the order to desist might be of such a character as to necessarily control the awarding of reparation, it was in no sense an adjudication of that subject. It therefore held that it might properly proceed at the present time with that branch of the case, and stated that it would do so.

It was held, secondly, with respect to the order to cease and desist, that, as to all territory over which the reduction of 1896 applied, the original case was ended and no further steps could be had, but that it was still open to the commission to inquire what that territory was and to proceed with respect to territory not embraced in those limits to correct the unreasonable rates produced by the exaction of this $2.00 charge. This, in the opinion of the commission, it might properly do by reopening the case which had been already heard. It therefore decided that it would reopen such case for the purpose of permitting the complainant to show to what territory that reduction applied; and inasmuch as conditions might have changed between the
376 date of our previous hearing in 1898 and the present time, it seemed proper to permit the defendants to prove, if they could, that rates from territory to which the reduction in question

did not apply were, nevertheless, so low, either by virtue of subsequent reductions or by reason of changed conditions, that the rate, plus the terminal charge, did not impose an excessive transportation charge upon the shipper.

The complainant requested that the matter of reparation might be further held in abeyance until the opinion of the court could be had upon the other branch of the case, since this might result in the saving of expense and inconvenience to all parties. The defendants made no objection to this, and the commission accordingly consented. The only branch of the case before us, therefore, at this time is that relating to an order for the future, and in the hearing of that but two questions of fact are open, which are:

1. To what territory did the reduction of 5 cents, mentioned in the previous report of this commission, as made October 1, 1896, apply.

2. As to the remaining territory, have the rates to Chicago become so low that the addition of the $2.00 terminal charge is not unjust and unreasonable. A third question of fact was gone into and has been considered by the commission, but that will be referred to later.

The defendants protested that the commission had no jurisdiction in the premises, excepted to its action in proceeding further in this case, and appeared specially in all these hearings.

1. The territory covered by the reduction of October 1, 1896, embraces the entire State of Texas north and west of the Galveston, Harrisburg & San Antonio Railroad, and the Houston, East & West Texas Railroad, including stations on the former and excluding those on the latter; also all stations in Indian Territory and Oklahoma Territory upon the Missouri, Kansas & Texas Railroad, the Rock Island system, and the Atchison system.

The reductions in this territory were not all 5 cents per hundred pounds to Chicago. That was the maximum, and applied to the greater part of the territory described, but in some sections
377 the reduction was less. These reductions appear to have applied only on cattle, the kind of live stock principally shipped to Chicago from this section. In 1902—the figures for later years are not available—2,924,124 cattle and calves were received at Chicago. Of these only 73,794 were from the State of Texas, and probably not more than 100,000 from the entire territory covered by these reductions. As to twenty-nine thirtieths of the shipments of the defendants, the exaction of this terminal charge has been illegal.

2. In order that the findings of fact with respect to the territory to which the reductions in question did not apply and which is, therefore, still before the commission in this proceeding, may be intelligible it is necessary to state what, as we understand the matter, the question of fact presented is.

It was held by the commission in the former case that while the carriers might segregate their rate, imposing a separate charge for delivery at the Union Stock Yards their action in adding to the former rate an arbitrary terminal charge was not in any proper sense such

a segregation; that the former rate to Chicago included a delivery at the Union Stock Yards and, therefore, that when the carriers added a charge of $2.00, while the expense of making the delivery had only been increased $1.00, they imposed upon the public an unreasonable transportation charge to the extent of $1.00. This view of the matter has been apparently approved by the Supreme Court of the United States.

A carload of live stock weighs approximately 20,000 pounds, so that $2.00 per car is equivalent to about 1 cent per hundred pounds. If, therefore, the carriers had reduced the Chicago rate by 1 cent a hundred pounds, or under the circumstances of this case, by ½ cent per hundred pounds and added this terminal charge, the through rate to the stock yards would still have been reasonable, their conduct in this respect would have been unexceptionable, and since terminal expenses of this kind are usually deducted before a division of the through rate, the carrier performing the special service would have received compensation for it. It is evident that if the Chicago rate was less than a fair compensation for delivery at the Union
378 Stock Yards by ½ cent per hundred pounds then the addition of the $1.00 terminal would not have produced an unreasonable charge in gross. It was said upon the argument of the original case that live-stock rates to Chicago were unreasonably low before June 1, 1894, and that for this reason the addition of the terminal charge was proper. There was, however, no testimony upon that subject and the commission held that in the absence of such testimony it must presume that the rate which the carrier had voluntarily established and was maintaining on May 31, 1894, was a reasonable rate including the entire service of delivery at the stock yards; and this view of the commission has apparently received the approval of the Supreme Court. But in the present record there is a great mass of evidence from both parties bearing upon the reasonableness of these rates; so that the question of fact before us is, were these rates so low in 1894, or are they, under changed conditions, so low to-day that the carriers may justly add this terminal charge without any equivalent reduction of the Chicago rate?

It seems necessary first to examine somewhat the history of these rates since 1894. The commission has caused elaborate tables to be prepared showing rates from nearly all cattle-shipping stations in territory west of the Mississippi River to Chicago, so that there is presented a complete history of these rates from all these stations from May 31, 1894, to May 23, 1904. It would not be profitable to attempt any complete statement of what this testimony shows, but certain illustrative examples may be given and for this purpose we will refer to the Chicago & Alton, the Burlington, the Rock Island, the Northwestern, and the Chicago, Milwaukee & St. Paul systems. It should be noted that from nearly all this territory cattle, sheep, and hogs are all marketed so that from each of the stations referred to there are usually three separate rates which are almost always dif-

ferent in amount and one of which may change without a corresponding change of the others.

There are shown by these tables on the Chicago & Alton in Missouri 53 stations, from which there were in effect May 31, 1894, 159 rates.

Between May 31, 1894, and May 23, 1904, there were 50 ad-
379 vances and 3 reductions. In case of the Rock Island system there were shown in Iowa, Missouri, and Kansas 215 stations with 645 rates. The advances were 216 and the reductions 18. The Northwestern system, not including the Elkhorn division, showed in the States of Wisconsin, Minnesota, South Dakota, Nebraska, North Dakota, and Iowa 599 stations with 1,797 rates. The advances were 214, the reductions 219. The Burlington system in Iowa and Missouri showed 333 stations with 999 rates, the total advances being 300, the reductions 33. The Chicago, Milwaukee & St. Paul showed 868 stations and 2,604 rates, with 229 advances, 443 reductions.

It will be seen, therefore, that the great majority of these rates remained exactly the same from 1894 down to 1904. The advances and reductions were about equal, and both advances and reductions were slight, on the average not probably equal to 1 cent per hundred pounds. In this finding we do not include either the territory to which the reduction of 1896 applied, or the territory covered by the case of the Cattle Raisers' Association of Texas hereafter referred to.

These changes in rates seem to have been made for various reasons. It was testified by all traffic officials that in the making of the Chicago rate, and, therefore, in the making of these changes no consideration whatever had been given to the terminal charge. When the initial line was not also the delivering line the rate was made by the initial line, which did not receive any part of the terminal charge, and even when the same line originated and delivered the traffic the terminal service was not considered. It was not claimed that any particular rate was too low by reason of these reductions unless the general level of live stock rates was too low.

We have said that the present record contains much testimony bearing upon the reasonableness of live stock rates to Chicago. The defendants contend and have introduced evidence tending to show that these rates on May 31, 1894, were not fairly compensatory even after the terminal charge had been added, and that even if they were sufficiently high on that date they are, owing to increased cost of
operation, too low at the present time. The complainant has
380 met this with the claim that they were unreasonably high in 1894 and that notwithstanding the increased cost of labor and supplies the actual expense of operation, owing to the adoption of various economies, is no more to-day than ten years ago, and that in view of the great increase of tonnage, rates should be lower, not higher, than they were in 1894.

Since 1899 cattle rates have been three times advanced from that territory to which the reduction of 1896 applied and are now higher than they have ever been since rates were first filed with the commission in 1887. Upon the making of the last advance in 1903 the Cattle

Raisers' Association of Texas filed complaint against the Missouri, Kansas & Texas Railway Company and many other railway companies attacking the reasonableness of rates from this territory and also from certain other territory west of the Missouri River and a great mass of evidence has been taken in that case. In addition many hundred pages of testimony were taken in this case. Written and oral arguments of great length and detail have been presented. We have before us in these two inquiries everything that can be shown and said as to the reasonableness of live stock rates from all points on shipments delivered by these defendants at Chicago.

In the opinions of the commission in the Cattle Raisers' Association of Texas *v.* The Missouri, Kansas & Texas Railway Company et a. post—and In the Matter of Class & Commodity Rates from St. Louis to Texas Common Points, ante—the subject of live stock rates, and the effect of the advance in the cost of labor and supplies on rates have been folly discussed. No special question arises with respect to these defendants. With two exceptions, possibly, they are among the most prosperous railroad systems in the whole country. Their earnings afford a munificent return upon the value of their properties when estimated by any standard. Not only have they in recent years paid and are to-day paying dividends upon their stocks much in excess of the average return of all kinds of property in the United States, but they have also out of their earnings continually improved those properties. The market value of their stocks is for the most part much above par.

381 It would not be profitable to repeat what is said in those opinions. Excluding the territory covered by the reduction of 1896 we find that live stock rates to Chicago made or participated in by these defendants were on May 31, 1894, a reasonable compensation for the service performed, including delivery at the Union Stock Yards; that at all times since May 31, 1904, such rates have been and now are sufficiently high to include a delivery at the Stock Yards as made previous to June 1, 1894; that no reduction has ever been made in any of these rates to offset the addition of the terminal charge of $2.00 per car; and that the imposition of any such charge, except in so far as the cost of delivery has been increased by the trackage charge which the defendants are compelled to pay is unreasonable.

In its former report the commission had found that previous to June 1, 1894, a delivery at the stock yards had been included in and paid for by the Chicago rate. The defendants had contended that this service was, previous to that date, a gratuity, but had introduced little direct testimony upon that point. Upon this hearing counsel asked that they be allowed to introduce further testimony in that behalf and that the commission reconsider, in view of such testimony, its former finding. Since it seemed desirable that all the facts should be fully presented the commission consented to hear this testimony and thereupon counsel produced on the part of each defendant one of the principal traffic officials of that company who

testified that previous to June 1, 1894, his company had performed the service of making delivery at the stock yards beyond its own line for nothing. On the strength of this testimony the defendants insist that the commission should reconsider its finding and now find as a matter of fact that this service had been, until the terminal charge was imposed, a gratuity. Since certain other testimony was brought out in the examination of these witnesses which bears upon this point it may be well to restate briefly our findings of fact in this respect.

Previous to 1865 live stock marketed in Chicago was delivered at four different points, and competitive conditions re-
382 quired all carriers to make delivery at either one of these points according as the shipper might direct. This led to much expense and inconvenience upon the part of the carriers making such deliveries and for the purpose of avoiding this the Union Stock Yards and Transit Company was organized. The purpose of that undertaking was to provide one place at which live stock would be delivered in the city of Chicago.

The movers in this enterprise were originally the railway companies interested. At first the stock was largely owned by the various railway lines bringing live stock to Chicago, but subsequently and from time to time this stock interest was transferred so that on June 1, 1894, the stock holdings of the railways in the Union Stock Yards and Transit Company were slight, if any. At first the directors of that company consisted almost entirely of representatives of the different railways interested, and a majority of the board continued to be made up in this manner until the management of the stock yards made known its determination to impose the trackage charge, June 1, 1894, when the various railway representatives resigned from the board of directors.

According to the original arrangement the Stock Yards Company was to construct, own and operate pens, shutes, tracks and other facilities for unloading, delivering, and marketing live stock. It was to construct tracks connecting its yards with the various lines of railway and to permit the railways to operate their own trains over these tracks to the unloading shutes without charge. All this was done as arranged. The stock yards were constructed by the Stock Yards Company and tracks laid connecting these yards with the various lines of railway. The railways ran their own trains, drawn by their own locomotives over these tracks of the Stock Yards Company without charge, but the Stock Yards Company received 25 cents a car for the service of unloading the cars of stock. While the original arrangement and understanding was that the railways should be given the free use of the tracks of the Stock Yards Company for the purpose of reaching the shutes and delivering live stock at the stock pens no formal contract of that sort was ever
383 entered into. Upon the one hand the railways were under no obligation to use these tracks or to unload their live stock at the stock yards and upon the other the Stock Yards Company was

under no legal liability to permit the various railways to use its tracks in obtaining access to its shutes and pens.

The actual outcome of this enterprise was precisely that which its original promoters had contemplated. All live stock, in a very short time, which was intended for the Chicago market was sent to the Union Stock Yards, and the stock yards which had been formerly used as pens of delivery were abandoned. From 1865 down to June 1, 1894, practically all the stock brought to Chicago for sale or other distribution was delivered at the Union Stock Yards. Several of these defendants had no facilities whatever except their station platforms for unloading stock at any other point, while others of them had stock pens at which live stock in very limited quantities could be discharged. Stock received for shipment to Chicago was sent to the Union Stock Yards as a matter of course without further direction upon the part of the shipper. Ordinarily the only destination mentioned in the live stock contract which the shipper was obliged to sign was Chicago, and under that contract the stock was taken to the Union Stock Yards. The tariffs of the defendants all specified a rate to Chicago, and under this tariff the public were entitled to ship to the Union Stock Yards.

It appeared in testimony upon the last hearing that a single system, the Burlington, had required in some cases previous to June 1, 1894, that their agents should ascertain the final destination of the stock and should waybill it accordingly. Considerable quantities of stock brought by that company to Chicago were destined to eastern points beyond Chicago, and this would not necessarily go to the Union Stock Yards. It might also happen occasionally that parties would desire to unload stock, especially horses and mules, at some other point than the Union Stock Yards. For these reasons, apparently, as a competitive measure, that company had provided, as stated in its circular of 1891, pens for the accommodation of eight carloads of
384 stock at Hawthorne avenue, and this circular required agents to call the attention of shippers to the fact that these pens were available for the purpose of unloading and resting stock without charge. The circular instructed agents to ascertain the final destination of the stock and to bill it to the Union Stock Yards or to Chicago, as the case might me. This was for the convenience of the Burlington road in the handling of this traffic. It appears that this company, like all the others, delivered, as a matter of course, all stock to be disposed of at Chicago at the Union Stock Yards.

An examination of the testimony of the traffic representatives of the various defendants who were produced as witnesses and testified upon the last hearing that the service of making delivery at the stock yards was a gratuity previous to June 1, 1894, shows that they based this assertion entirely upon the fact that the stock yards were not located upon the rails of their respective companies. They stated that in their opinion any service performed by a railroad beyond its own iron must of necessity be a gratuity, and hence this service was a

gratuity. They testified to no fact which contradicted the evidence already before the commission; indeed, their testimony was strongly confirmatory of that evidence; they simply gave their opinion upon the conceded facts.

We hardly think that the expression of this opinion can be of much value as evidence. For example, the Illinois Central Railroad Company, previously to June 1, 1894, had no stock yards of its own in the city of Chicago. It occasionally delivered a carload of horses or mules upon its freight platforms, and it made deliveries at one or two private yards when stock was consigned to the owners of those yards, but the only point to which it could and did deliver live stock in the city of Chicago was at the Union Stock Yards. Now, how can it in any way modify the fact when Mr. Keepers, the general freight agent of that company, testifies that according to his understanding the service of his company beyond its own iron must be a gratuity? We find as a fact, in so far as this question is a question of fact, that previous to June 1, 1894, a delivery at the Union Stock Yards was included in the contract of shipment to Chicago, and paid for by the rate to Chicago.

385 The facts as to facilities for delivery at points other than the Union Stock Yards by these various defendants at the present time were clearly brought out on the last hearing and should also be noted. The Wabash Company has no such facilities whatever and can and does only make delivery of live stock at the Union Stock Yards. Mr. Peabody, the statistician of the Atchison, Topeka & Santa Fe, was delegated to ascertain the location of the stock yards of the various defendants and give testimony upon that point. He stated that he had written the general freight agent of the Chicago & Alton asking the location of its stock yards and had been informed by him that his company had no stock yards at Chicago. The other defendants all have points at which they can make delivery of live stock in limited quantities upon their own rails. In cases where such facilities existed previous to June 1, 1894, they do not appear to have been enlarged. Where such facilities did not exist they have been provided for the purpose of being able to state that they in fact exist. These facilities are used in exactly the same manner and to no greater extent now than they were before the imposition of the terminal charge. It appeared that between 500 and 600 carloads of stock were unloaded each year by the Burlington system at its Chicago yard, but it did not appear that any of these were for disposition in Chicago. With the exception of horses and mules to some extent, and an occasional carload of sheep and cattle, live stock for sale in Chicago is now taken to the Union Stock Yards in exactly the same way that it was before the $2 charge was imposed.

One other fact may perhaps be stated. It was suggested in the original report that the defendants probably made delivery of live stock at the Union Stock Yards as cheaply as they could provide facilities of their own and as cheaply as they delivered other car-

load freight in the city of Chicago, but there was no testimony from which a definite finding could be made. Such evidence was given upon the last hearing. Mr. Peabody, above mentioned, testified that the actual cost to his company of making deliveries of all carload freight in the city of Chicago either at final destination or to some connecting road for shipment beyond was $5.40 per car. He
386 also said that he knew of no reason why the expense of the Santa Fe system was greater in this particular than that of other lines entering Chicago. Upon this testimony we find that the expense of delivering carload freight by the defendants in Chicago is approximately $5.40 per car.

Upon the former hearing the Sante Fe Company filed a statement showing that the cost of delivering carloads of live stock at the Union Stock Yards was $2.28 per car, including trackage and 25 cents per car for unloading. Delivery by that company seems to be made at the present time at a somewhat less expense than formerly, owing to the fact that it pays either a less trackage charge or no trackage charge for the use of certain lines by which it reaches the rails of the Union Stock Yards and Transit Company. Mr. Peabody gave in detail the expense of making deliveries for two months, viz, January, 1904, $1.79, and October, 1904, $1.77. In both these computations the cost of unloading was included and also the station expense of that company at the Union Stock Yards, which was for the two months about two-thirds as much as the expense of operating its trains to and from the stock yards.

CONCLUSIONS.

The able attorney for the defendants, who appeared for the first time in this last hearing, has urged upon us with great earnestness certain considerations not much insisted upon in the former stages of this case, which should, he argues, lead to a modification of our previous conclusions of law. He urges, first, that the Union Stock Yards can not be to-day and can not have been in the past the live stock depot of these defendants, for the reason that they do not exercise over it the same control which they exercise over their depots proper. The representatives of the various defendants were asked in detail whether their respective companies had to do with the building, the repairing, the insuring of the Union Stock Yards, or whether they appointed or directed in any way the help employed there. They all united in disclaiming any connection of this sort with that enterprise, and from this we are pressed to conclude that the stock yards could not be the depot of these defendants.
387 Some little time ago this commission heard the complaint of the Central Stock Yards Company, in which it was alleged that the Louisville & Nashville Railroad was unlawfully discriminating against the complainant in making deliveries of live stock at the Bourbon Stock Yards in Louisville, Kentucky, while it declined to

make similar deliveries at the stock yards of the complainant. The Louisville & Nashville Co. was represented by the same learned attorney who now represents these defendants, and in that suit his defense was that the Louisville & Nashville had made the Bourbon Stock Yards its exclusive live stock depot. The Bourbon Stock Yards Company constructed all the facilities, kept them in repair, insured them if they were insured, controlled the help and indeed assumed the entire control and management of the plant and yet it was urged that these stock yards were the live stock depot of the Louisville & Nashville Railroad. Counsel enforced that contention by reason as well as by the highest judicial authority and the commission held with him. Central Stock Yards Co. v. Louisville & N. R. Co., 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Railroad Commission v. Louisville & N. R. Co., 10 I. C. C. Rep. 173.

In that case the defendant railroad company had entered into a contract with the Bourbon Stock Yards Company by which it agreed to make those stock yards its exclusive live stock depot. In this case by arrangement which never took the form of a specific contract these defendants made the Union Stock Yards their depot in exactly the same way. What we call attention to is the fact that a railroad may maintain its live stock depot at a particular point although it neither builds nor repairs nor insures the stock pens into which the cattle are unloaded nor hires nor controls the men who do the unloading. Whether the Union Stock Yards at Chicago were in railroad phraseology or in legal definition the depot of these defendants is immaterial; they were and still are in fact the point to which this stock is transported and unloaded under the shipping contract of the defendants.

Counsel vigorously insists that inasmuch as the service of transporting these carloads of live stock to the Union Stock
388 Yards was performed beyond the rails of the defendants it must have been a gratuity. It is not obvious to us why if one railroad company leases or otherwise obtains the use of the tracks of another railroad company for the purpose of performing a particular service that service must of necessity be a gratuity. Strictly speaking in such case the tracks of the first company are, quoad the performance of that service, the tracks of the company which performs the service. These defendants had the right, previous to June 1, 1894, to operate their trains over the iron of the Stock Yards Company without payment in exactly the same way that they do today by the payment of a trackage charge. The stock was in their custody then as it now is until it was delivered to the owner or his consignee at the Union Stock Yards. The defendants would undoubtedly be liable for any damages which accrued after their trains entered upon the tracks of the Stock Yards Company in exactly the same way as over any other part of the transit. Upon what definition can that be called a gratuity which the shipper has a legal right to demand and which the carrier is under legal obligation to furnish?

It is suggested that in the last ten years reductions have been made in many hundred cases which are greater than the amount of this terminal charge and that in these cases, upon the theory of the Supreme Court, the imposition of the charge is proper. We do not so understand the decision. The addition of the terminal charge is only proper when the reduction has been such that the entire rate to the Union Stock Yards is reasonable. The commission did not intend to hold in its former opinion that if the total through rate was reasonable the terminal charge would be unlawful, but rather that the mere fact of a reduction made without reference to the terminal charge, would not show, in the absence of other testimony, that the through rate was reasonable. The court seems to have entertained a different opinion; but that has no application here, since it has been found not only that these scattered reductions had no reference to the terminal charge, but also that the reduced rate was still sufficient to include a delivery at the Union Stock Yards. If the opposite view were to prevail there would be numerous instances in which the delivering charge might be applied to a carload of hogs and not to a carload of cattle shipped from the same station.

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It will be remembered that the minimum trackage charge is 80 cents per car. In our opinion the defendants are justified in imposing whatever terminal charge has been necessitated by this exaction of the Stock Yards Company. Since this charge varies in different cases these carriers might, therefore, impose different terminal charges, but it is conceded that the charge must be the same by all. To compel those paying 80 cents to make only that charge would be in effect to compel every line to reduce its charge to the same figure. It seemed to us, therefore, that it was fair under all the circumstances to allow these carriers to impose a charge of $1.00. It was stated in the opinion denying the motion for reargument that the carriers were satisfied with this, provided the charge was to be adjusted upon the basis recommended by the commission. Since the conclusion of the taking of testimony in the present hearing the defendants have filed statements disclaiming any intention upon their part to admit that $1.00 was a reasonable charge for transporting this live stock to the Union Stock Yards. Apparently these statements have been filed to rebut any presumption that the carriers had admitted that the charge found by the commission was a proper one, and if so, they in no way alter our previous conclusion. However this may be, since the commission only has power to direct the carriers to cease and desist from the present charge of $2.00, and since this charge is greater than the trackage paid by any company, the defendants will be ordered to desist from imposing the present charge as to all territory not embraced in the reduction of 1896, as described in the findings.

The case will be retained for further proceedings in the matter of reparation.

(Endorsed:) Filed May 28th, 1908. Henry D. Lang, clerk.

390 Thereafter and on May 29th, 1908, the following replication was filed of record in said cause, to wit:

In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of the Chicago Great Western Railway Company; *Chicago Great Western Railway Company;* Chicago, Burlington & Quincy Railroad Company; Illinois Central Railroad Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee and St. Paul Railway Company; The Chicago & Alton Railroad Company; The Chicago, Rock Island and Pacific Railway Company, and The Atchison, Topeka and Santa Fe Railway Company, complainants,

vs.

THE INTERSTATE COMMERCE COMMISSION, defendants.

In equity No. 877.

REPLICATION TO ANSWER.

Come now the complainants herein, replicants herein, and saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendant, the Interstate Commerce Commission, for replication thereunto say that they do and will aver, maintain, and prove their said bill of complaint herein to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently re-

391 plied unto, confessed or avoided, traversed or denied, is true, all of which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

WILLIAM D. MCHUGH,
Solicitor for Complainants.

(Endorsed:) Replication. Filed May 29th, 1908. Henry D. Lang, clerk.

And thereafter on the 1st of June the following appearance of L. A. Shaver was filed for defendant, viz:

392 *Circuit Court of the United States, District of Minnesota, Third Division.*

ALPHEUS B. STICKNEY ET AL.
vs.
INTERSTATE COMMERCE COMMISSION.
} Appearance. No. 877, Equity.

The clerk will enter my appearance for the defendant, the Interstate Commerce Commission, in the above-entitled cause.

L. A. SHAVER, *Solicitor.*

(Endorsed:) Appearance of L. A. Shaver for defendant. Filed June 1st, 1908. Henry D. Lang, clerk.

And on the same day the above appearance was entered of record on behalf of defendant, viz:

393 U. S. Circuit Court, District of Minnesota, Third Division. Chancery Rule and Order Book.

1908. June 1.

A. B. STICKNEY ET AL
vs.
THE INTERSTATE COMMERCE COMMISSION.
} Equity, No. 877.

This day comes the defendant by L. A. Shaver, solicitor, on whose motion it is hereby ordered that the appearance of said defendant be and the same is hereby entered.

Common Rule & Order Book "C," page 140.

Thereafter and on July 1st, 1908, the following receipt of Hon. Willis Van Devanter was filed in said cause, viz:

394 Hon. Walter H. Sanborn, St. Paul, Minn.
Hon. Willis Van Devanter, Cheyenne, Wy.
Hon. William C. Hook, Leavenworth, Kan.
Hon. Elmer B. Adams, St. Louis, Mo.
} Circuit Judges.
Hon. Wm. Lochren, Minneapolis, Minn.
Hon. Page Morris, Duluth, Minn.
} District Judges.

[United States Circuit Court, District of Minnesota. Henry D. Lang, clerk. Louise B. Trott, deputy.]

General terms:

First Tuesday in June and first Tuesday in December.
Rule day, first Monday in each month.

ST. PAUL, *May 11th, 1908.*

Hon. WILLIS VAN DEVANTER,
U. S. Circuit Judge, Cheyenne, Wy.

MY DEAR JUDGE: I hand you herewith a certified copy of certificate of the Attorney-General under the acts of February 11, 1903, and

June 29, 1906, filed to-day in case No. 877, equity, Alpheus B. Stickney et al. vs. Interstate Commerce Commission. Kindly acknowledge receipt thereof.

Sincerely, yours, HENRY D. LANG, *Clerk.*

Dictated.
Enc.

Received a copy of the above.

WILLIS VAN DEVANTER,
Circuit Judge.

(Endorsed:) Receipt of Hon. Willis Van Devanter for certified copy of Attorney-General's certificate. Filed July 1st, 1908. Henry D. Lang, clerk.

* * * * * * *

411 In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of The Chicago Great Western Railway Company; Chicago Great Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Illinois Central Railroad Company; Chicago and Northwestern Railway Company; Chicago, Milwaukee and St. Paul Railway Company; The Chicago and Alton Railroad Company; The Chicago, Rock Island and Pacific Railway Company; and The Atchison, Topeka and Santa Fe Railway Company, complainants,

vs.

THE INTERSTATE COMMERCE COMMISSION, DEFENDANT. } In equity.

This cause came on to be heard at this term on a motion for a temporary restraining order and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows: That the order made by the defendant, the Interstate Commerce Commission, heretofore, to wit, on December 10, 1907, in words and figures as follows: "It is ordered, that the defendants, the Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago, Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company, and Illinois Central Railroad Company, be, and they are hereby, required to cease and desist on or before the 1st day of
412 February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of the

State, their present terminal charge of $2 per car. It is further ordered, that said defendants be, and they are hereby, notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the State of Illinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them," and any subsequent order or orders extending the time for putting the foregoing order into force and effect and each and all thereof be and the same are hereby suspended and the enforcement of each and all thereof be and the same is hereby restrained and enjoined until the further order of this court. And it is further ordered, adjudged, and decreed that until the further order of this court each of the complainants in this action, make, keep, and maintain a constant and permanent record showing the number of cars of live stock brought from outside the State of Illinois and carried by them from the terminals of their own lines respectively over the tracks of the Union Stock Yards & Transit Company to the Union Stock Yards in the city of Chicago; the dates of such carriage, the names of the respective consignors and consignees of such live stock
413 and the charges made by the respective complainants for such terminal service and the charges prescribed therefor at the time such service was rendered by the Interstate Commerce Commission, and that said complainants and each of them hold the said record showing the facts above mentioned subject to the further orders of this court. It is further ordered that the complainants within twenty days after the filing of this order file with the clerk of this court a bond payable to the United States of America for the benefit of any person or persons damaged in the penal sum of $100,000.00 with surety or sureties to be approved by one of the judges of this court, or, in the absence of such judge from this district, by the clerk of this court, conditioned that they and each of them will comply with the orders made upon them in this decree and with the future order or orders which may be made upon them in the premises, and that they will pay any damages sustained by shippers of live stock over their respective railroads by reason of this injunction if the same shall hereafter be dissolved.

June 30, 1908.

WALTER H. SANBORN,
WILLIAM C. HOOK,
ELMER B. ADAMS,
United States Circuit Judges
for the Eighth Circuit.

(Endorsed:) Interlocutory decree ordering temporary injunction. Filed June 30th, 1908. Henry D. Lang, clerk.

414 Thereafter and on July 8th, 1908, the following interlocutory decree was filed with proof of service thereon, viz:

In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of The Chicago Great Western Railway Company; Chicago Great Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Illinois Central Railroad Company; Chicago and Northwestern Railway Company; Chicago, Milwaukee and St. Paul Railway Company; The Chicago and Alton Railroad Company; The Chicago, Rock Island and Pacific Railway Company; and The Atchison, Topeka and Santa Fe Railway Company, complainants,

vs.

THE INTERSTATE COMMERCE COMMISSION, defendant.

In equity.

This cause came on to be heard at this term on a motion for a temporary restraining order and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows: That the order made by the defendant, the Interstate Commerce Commission, heretofore, to-wit, on December 10, 1907, in words and figures as follows: "It is ordered that the defendants, the Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Chicago & Alton Railroad Company, Chicago, Rock Island & Pacific Railway Company, Atchison, Topeka & Santa Fe Railway Company, and Illinois Central Railroad Company, be, and they are hereby, required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock
415 at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of the State, their present terminal charge of $2 per car. It is further ordered, that said defendants be, and they are hereby, notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the State of Illinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them," and any subsequent order or orders extending the time for putting the foregoing order into force and effect and each and all thereof be and the same are hereby suspended and the enforcement of each and all thereof be and the same is hereby restrained and enjoined until the further order of this court. And it is further ordered, adjudged, and decreed that until the further

order of this court each of the complainants in this action, make, keep, and maintain a constant and permanent record showing the number of cars of live stock brought from outside the State of Illinois and carried by them from the terminals of their own lines respectively over the tracks of the Union Stock Yards & Transit Company to the Union Stock Yards in the city of Chicago; the dates of such carriage, the names of the respective consignors and
416 consignees of such live stock, and the charges made by the respective complainants for such terminal service and the charges prescribed therefor at the time such service was rendered by the Interstate Commerce Commission, and that said complainants and each of them hold the said record showing the facts above mentioned subject to the further orders of this court. It is further ordered that the complainants within twenty days after the filing of this order file with the clerk of this court a bond payable to the United States of America for the benefit of any person or persons damaged in the penal sum of $100,000.00, with surety or sureties to be approved by one of the judges of this court, or in the absence of such judge from this district, by the clerk of this court, conditioned that they and each of them will comply with the orders made upon them in this decree and with the future order or orders which may be made upon them in the premises and that they will pay any damages sustained by shippers of live stock over their respective railroads by reason of this injunction if the same shall hereafter be dissolved.

June 30, 1908.

WALTER H. SANBORN,
WILLIAM C. HOOK,
ELMER B. ADAMS,
United States Circuit Judges for the Eighth Circuit.

(Endorsed:) Interlocutory decree ordering temporary injunction. Filed June 30th, 1908. Henry D. Lang, clerk.

417 UNITED STATES OF AMERICA.
District of Minnesota, Third Division, sct.

I, Henry D. Lang, clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writing with the original thereof, which is in my custody as such clerk, and that the said paper writing is a correct copy of such original and of the whole thereof, in the cause therein named.

Witness my hand as clerk, and the seal of said court. Done at my office in St. Paul, Minnesota, this 30th day of June, A. D. 1908.

[SEAL.] HENRY D. LANG, *Clerk.*

(Endorsed:) Served a certified copy of within order on Interstate Commerce Commission by service upon Martin A. Knapp, chairman, July 3, 1908.

AULICK PALMER,
U. S. Marshal District of Columbia.

Filed July 8th, 1908. Henry D. Lang, clerk.

Thereafter and on July 16th, 1908, the following assignment of errors was filed in said cause, viz:

418 In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of The Chicago Great Western Railway Company, Chicago Great Western Railway Company et al., complainants
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

ASSIGNMENT OF ERRORS.

And now comes the Interstate Commerce Commission, by Chas. C. Houpt, district attorney of the United States for the District of Minnesota, and charges that in the order and decree rendered by said Circuit Court for said district in the above entitled cause on the thirtieth day of June, 1908, wherein and whereby said court suspended the order of the Interstate Commerce Commission as therein shown and restrained and enjoined the enforcement of the same, and in the record and proceedings therein there is manifest error to its injury, in this, to-wit:

1. Said Circuit Court erred in not dismissing the bill of complaint for want of equity.

2. Said court erred in not dismissing complainants' bill for want of jurisdiction.

3. Said court erred in not dismissing said bill because there is not set forth therein, or made a part thereof as an exhibit, the report and opinion of the commission giving the grounds upon which it based the order in question.

419 4. Said court erred in not dismissing said bill on the allegations and denials of the answer of the Interstate Commerce Commission.

5. Said court erred in not dismissing said bill because there is no allegations therein that irreparable injury will result from the failure to enjoin the enforcement of the order in question and no facts are alleged showing, or tending to show, that such injury will or can result therefrom.

6. Said court erred in holding that the action of the Interstate Commerce Commission in making the order in question was reviewable in the courts.

7. Said court erred in not dismissing the complainants' bill and in making the order suspending the order of the Interstate Commerce Commission and in restraining and enjoining the enforcement thereof, in the absence of any allegation or showing by complainants that the terminal charge of one ($1.00) dollars per car as prescribed by the commission in connection with the through rate on shipments of live stock to which it applied, deprived the complainants of property

without due process of law or constituted a taking of their property without just compensation.

8. Said court erred in not holding that the through rate from point of shipment of the live stock to the Chicago terminals of the carriers included full compensation for the carriage thereof on to the stock yards, and that the two ($2.00) dollars additional charge was,
420 whether considered as a segregated charge for the terminal service or an addition to the through rate, unwarranted and extortionate.

9. Said court erred in holding, in effect, that the Interstate Commerce Commission erred as a matter of law in considering the fact of the payment of the through rate in connection with the terminal charge, in determining the reasonableness of the terminal charge.

10. Said court erred in not holding that the fact that the carriers for 29 years prior to 1894, under their contracts to carry to Chicago, delivered carloads of cattle to the stock yards without making any charge other than that which was embraced in the through rate, raised the presumption that the through rate included adequate compensation for the services rendered to the point of delivery at the stock yards and that those services were not gratuitously performed.

11. Said court erred in holding, in effect, that the mere imposition by the stock yards company of a new burden in the shape of a trackage charge, averaging one ($1.00) dollar per car, justified an additional charge by the carriers of two ($2.00) dollars per car.

12. Said court erred in holding that it was conceded by the pleadings that the actual cost to complainants of carrying live stock from their respective terminal yards at the ends of their lines of roads in Chicago to the Union Stock Yards exceeds the sum of two ($2.00) dollars per car.

421 13. Said court erred in making said order suspending and enjoining the order of the Interstate Commerce Commission, in absence of any allegation or showing that the cost of the service of delivery of live stock from the end of the defendant's rails to the Union Stock Yards, independent of the cost of unloading, the cost of maintenance of delivering agencies at the Union Stock Yards, and independent of the costs of returning the empty cars was more than one (1.00) dollars per car.

14. Said court erred in holding, in effect, that, although the through rate from points of origin of live-stock shipments of the Chicago terminals of the carriers embraced a presumably adequate charge for the terminal service rendered in continuing the carriage of the live stock from those terminals to the stock yards, the carriers had the right to impose a distinct additional charge for such terminal service without subtracting from the said through rate the terminal charge embraced therein, and that the commission had no right to forbid such second or additional terminal charge.

15. Said court erred in not holding that said terminal charge in addition to a presumably adequate terminal charge already absorbed or embraced in the through rate, was extortionate and not justified

by the fact, if it be a fact, that said additional terminal charge was not in itself unreasonably high.

422 16. Said court erred in considering the one (1.00) dollars per car as the sole compensation for the terminal service and in holding in effect that the reasonableness in the same must be considered independent of the fact that in all cases where it is imposed there is also paid to the complainant carrier a through rate which the commission found in its report and opinion embraced compensation for delivery to the Union Stock Yards.

17. Said court erred in holding that the complainants had segregated the terminal service and terminal charge from the through service and through rate.

18. Said court erred in holding that it was required by the act to regulate commerce; that the charge for the terminal service should be separately scheduled, and on that account that the commission should have determined its reasonableness alone by the cost of the particular service independent of the payment of the through rate.

19. Said court erred in holding that the expenditure for trackage and other costs of making delivery at the Union Stock Yards is totally distinct and separate from that involved in the transportation of such live stock over their own lines to the end of their own rails.

20. Said court erred in holding, in effect, that the mere statement by the carriers in their tariffs that the second charge was a separate and distinct charge for the terminal service altered the fact

423 that, as found by the Supreme Court, that charge was "a mere addition to the sum of the terminal charge embraced in the prior through rate."

21. Said court erred in holding, in effect, that there could be a segregation of the terminal charge from the through rate without substracting from the through rate the terminal charge already embraced therein.

22. Said court erred in holding, in effect, that the Interstate Commerce Commission has no jurisdiction or authority to forbid a terminal charge although reasonable in itself, when an adequate terminal charge is already absorbed or embraced in the through rate.

23. Wherefore the Interstate Commerce Commission prays that the decree of said Circuit Court rendered on the 30th day of June, 1908, be reversed and that said Circuit Court be ordered to enter a decree, dismissing the petition or bill of complaint in the above-entitled cause by the said complainants against said Interstate Commerce Commission.

CHARLES C. HOUPT,
District Attorney for the United States
for the District of Minnesota.

(Endorsed:) Assignment of errors. Filed July 16th, 1908. Henry D. Lang, clerk.

Thereafter and on the same day the following petition for and order allowing appeal was filed and entered in said cause, viz:

424 In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of the Chicago Great Western Railway Company, Chicago Great Western Railway Company, complainants,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

PETITION FOR APPEAL.

The Interstate Commerce Commission, being a bureau or department of the Government of the United States, by Charles C. Houpt, district attorney of the United States for the district of Minnesota, being thereunto duly authorized, represents that in the decree or order of said circuit court in the above-stated case, rendered on the thirtieth day of June, 1908, there is manifest error in its injury; and, therefore, prays for an order granting an appeal from said decree to the Supreme Court of the United States.

CHARLES C. HOUPT,
District Attorney of the United States for the District of Minnesota.

425 In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of the Chicago Great Western Railway Company, Chicago Great Western Railway Company, et al., complainants,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

ORDER ALLOWING APPEAL.

In this cause, the Interstate Commerce Commission, by Chas. C. Houpt, district attorney of the United States for the district of Minnesota, thereunto duly authorized, having made its application in writing for an appeal from the decree therein, rendered on the thirtieth day of June, 1908, to the Supreme Court of the United States, and the said Interstate Commerce Commission, being a bureau or department of the Government of the United States, and it appearing that the matter in dispute in said cause exceeds the sum of $5,000, exclusive of costs, it is therefore, ordered that said appeal be and the same is, hereby granted and made returnable on the twenty-first day of September, 1908.

WALTER H. SANBORN,
Circuit Judge.

(Endorsed:) Petition and order allowing appeal. Filed July 16th, 1908. Henry D. Lang, clerk.

426 And thereafter on the same day the following Praecipe for return to U. S. Supreme Court was filed in said cause, viz:

Circuit Court of the United States, District of Minnesota, Third Division.

ALPHEUS B. STICKNEY, ET AL., *vs.* INTERSTATE COMMERCE COMMISSION.	Praecipe for return to Supreme Court of the United States upon appeal.

To the Clerk of the above named court:

Please prepare a return to the Supreme Court of the United States upon the appeal in the above entitled cause and include therein all the files and records.

CHAS. C. HOUPT,
District Attorney of the United States for the district of Minnesota.

Dated St. Paul, Minnesota, July 16th, A. D. 1908.

(Endorsed:) Praecipe for return to U. S. Supreme Court. Filed July 16th, 1908. Henry D. Lang, clerk.

Thereafter and on July 17th, 1908, the following original citation was filed in said cause with proof of service, viz:

427 In the circuit court of the United States within and for the district of Minnesota, third division.

ALPHEUS B. STICKNEY AND CHARLES H. F. Smith, receivers of the Chicago Great Western Railway Company, Chicago Great Western Railway Company, et al., complainants,
v.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

CITATION ON APPEAL.

The United States of America, eighth judicial circuit.

The President of the United States, to Alpheus B. Stickney and Charles H. F. Smith, receivers of the Chicago Great Western Railway Company, Chicago Great Western Railway Company et al., or to William D. McHugh, their solicitor of record, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within 66 days from the date hereof, pursuant to the appeal sued out and filed in the clerk's office, in the United States Circuit Court for the

District of Minnesota, in the cause wherein the Interstate Commerce Commission was defendant and said Alpheus B. Stickney and Charles H. F. Smith, receivers of the Chicago Great Western Railway Company, Chicago Great Western Railway Company et al., were complainants, to show cause, if any there be, why the decree rendered against the said Interstate Commerce Commission, as
428 in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Hon. Walter H. Sanborn, U. S. Circuit Judge for said Eighth Judicial Circuit, this the sixteenth day of July, in the year of our Lord, one thousand nine hundred and eight.

WALTER H. SANBORN,
Circuit Judge.

Due service of above citation is hereby confessed this 17th day of July, 1908.

WILLIAM D. MCHUGH,
Solicitor for Complainants.

429 (Indorsed:) Entered. No. 877 Eq. United States of America, district of Minnesota, circuit court, third division. A. B. Stickney et al., complainants vs. Interstate Commerce Commisision, defendant. Citation on appeal with proof of service. Filed July 17th, 1908. Henry D. Lang, clerk.

430 Thereafter and on July 18th, 1908, the following bond on appeal was filed in said cause, viz:

In the circuit court of the United States within and for the district of Minnesota, third division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, RECEIVERS of the Chicago Great Western Railway Company, Chicago Great Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Illinois Central Railroad Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Chicago & Alton Railroad Company, The Chicago, Rock Island and Pacific Railway Company, and The Atchison, Topeka & Santa Fe Railway Company, complainants,
v.
THE INTERSTATE COMMERCE COMMISSION, DEFENDANT. } Bond.

Know all men by these presents that we, Alpheus B. Stickney and Charles H. F. Smith, receivers of the Chicago, Great Western Railway Company, Chicago Great Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Illinois Central Railroad Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Chicago & Alton Railroad Company, The Chicago, Rock Island and Pacific Railway Company, and The Atchison, Topeka & Santa Fe Railway

Company, as principals, and National Surety Company as surety, are held and firmly bound unto the United States of America in the penal sum of one hundred thousand dollars ($100,000.00) for the payment of which, well and truly to be made, we do hereby bind ourselves and our successors, jointly and severally, firmly by these presents.

Dated this 14th day of July, 1908.

431 The condition of the above obligation is such, that:

Whereas, on the 30th day of June, 1908, in the above-entitled cause pending in the above-entitled court, on application of the above-named complainants, an order was entered by said Circuit Court of the United States within and for the District of Minnesota, Third Division, in and by which order it was provided that the order made by the Interstate Commerce Commission in words and figures as follows:

"It is ordered, that the defendants, the Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Chicago & Alton Railroad Company, Chicago, Rock Island & Pacific Railway Company, Atchison, Topeka & Santa Fe Railway Company, and Illinois Central Railroad Company, be, and they are hereby, required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car. It is further ordered, that said defendants be, and they are hereby, notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the
432 State of Illinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them," and any subsequent order or orders extending the time for putting the foregoing order into force and effect and each and all thereof were suspended, and the enforcement of each and all thereof was restrained and enjoined until the further order of said court; and in and by which said order it was further provided that until the further order of said court each of the complainants above named should make, keep, and maintain a constant and permanent record showing the number of cars of live stock brought from outside the State of Illinois and carried by them from the terminals of their own lines respectively, over the tracks of the Union Stock Yards & Transit Company to the Union Stock Yards in the city of Chicago, the dates of such carriage, the names of the respective consignors and consignees of such live stocks, and the charges made by the respective complainants for such terminal service and the charges

prescribed therefor, at the time each service was rendered, by the Interstate Commerce Commission, and that said complainants and each of them hold the said record showing the facts above mentioned, subject to the further orders of said court.

Now, therefore, if the said complainants comply with the orders made upon them in the said order and decree and comply with any future order or orders which may be made upon them in the premises, and will pay any damages sustained by shippers of live stock
433 over their respective railroads by reason of said injunction if the same shall hereafter be dissolved, then this obligation to be void; otherwise, to remain in full force and effect.

This bond is given pursuant to the said order, and is payable in accordance with the said order to the United States of America for the benefit of any person or persons who may be damaged as in said order provided.

In witness whereof the parties hereto have caused this instrument to be properly executed the day above written.

A. B. STICKNEY,
CHAS. H. F. SMITH,
Receivers of the Chicago Great Western Railway.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
[SEAL.] By A. B. STICKNEY, *President.*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
[SEAL.] By GEO. B. HARRIS, *President.*

ILLINOIS CENTRAL RAILROAD COMPANY,
[SEAL.] By I. G. RAWN, *Vice-President.*

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
[SEAL.] By M. HUGHITT, *President.*

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
[SEAL.] By J. H. HILAND, *3d Vice-President.*

CHICAGO & ALTON RAILROAD COMPANY,
[SEAL.] By P. H. HULAHAN, *General Manager.*

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
[SEAL.] By B. F. WINCHELL, *President.*

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
[SEAL.] By W. B. JANSEN, *Fourth Vice-President.*

NATIONAL SURETY COMPANY,
A. L. FRASER, *Resident Vice-President.*
[SEAL.] H. L. BOHANNAN, *Resident Assistant Secretary.*

434 STATE OF ILLINOIS,
County of Cook, ss:

On this 14th day of July, A. D. 1908, before me appeared George B. Harris, I. G. Rawn, M. Hughitt, J. H. Hiland, P. H. Hulahan, B. F. Winchell, and W. B. Jansen, to me personally known, who, being duly sworn, did severally say that they are, respectively, the president of the Chicago, Burlington & Quincy Railroad Company, the vice-president of the Illinois Central Railroad Company, the president of the Chicago & Northwestern Railway Company, the third vice-president of the Chicago, Milwaukee & St. Paul Railway Company, the general manager of the Chicago & Alton Railroad Company, the president of the Chicago, Rock Island & Pacific Railway Company, and the fourth vice-president of the Atchison, Topeka & Santa Fe Railway Company; that the seals affixed to the foregoing instrument are the corporate seals of the corporations whose seals they purport to be, and that said instrument was executed in behalf of sad dcorporation by authority of its board of directors, and said George B. Harris, I. G. Rawn, M. Hughitt, J. H. Hiland, P. H. Hulahan, B. F. Winchell, and W. B. Jansen severally acknowledge said instrument to be the free acts and deeds of said corporations, respectively.

[NOTARIAL SEAL.] OVIDE LANGLOIS,
Notary Public, Cook County, Illinois.

My commission expires January 23rd, 1911.

435 NATIONAL SURETY COMPANY.

Certificate of appointment of resident vice-president.

Know all men by these presents that A. L. Fraser has been and is hereby appointed resident vice-president of the National Surety Company at Chicago, Ill., and as such resident vice-president has full power and authority to sign and execute on behalf of the company any and all bonds, and all bonds signed by him, when sealed and attested by the secretary, an assistant secretary, or a resident assistant secretary, shall be as valid and binding upon the company as if said bonds had been signed by the president and duly sealed and attested.

Said appointment is made under and by authority of a certain by-law adopted by the board of directors of said National Surety Company at a regular meeting duly called and held on the fourth day of February, 1908, a certified copy of which is hereto attached, and is subject to revocation as therein provided.

In testimony whereof the National Surety Company has caused these presents to be signed by its president, and its corporate seal to

be hereto affixed, duly attested by its asst. secretary, this 13th day of April A. D., 1908.

[SEAL.] WM. B. JOYCE, *President.*

Attest:

WM. I. HAWKS,
1st Vice Secretary.

436 STATE OF NEW YORK,
County and City of New York, ss:

On this 13th day of April, A. D. 1908, before me appears Wm. B Joyce, president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, says that he is president of the National Surety Company; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as president of said company, by like authority. That said Wm. B. Joyce further says that he is acquainted with Wm. I. Hawks, and knows him to be the asst. secretary of said company; that the signature of said Wm. I. Hawks, subscribed to the said instrument, is the genuine handwriting of the said Wm. I. Hawks, and was thereto subscribed by like order of the said board of directors.

[SEAL.] JERROLD SMULLEN,
Notary Public No. 369 for County of New York.

Certificate filed in Kings, Queens, Richmond, and Westchester counties.

437 *Copy of by-law.*

Be it remembered that at a meeting of the board of directors of the National Surety Company, duly called and held on the fourth day of February, 1908, a quorum being present, the following by-law was adopted:

"Article XII, section 1. The president or first vice-president may from time to time appoint resident vice-presidents, resident assistant secretaries, and attorneys in fact to represent and act for and on behalf of the company; and either the president, first vice-president, the board of directors, or the executive committee may at any time remove any such resident vice-president, resident assistant secretary, or attorney in fact, and revoke the power and authority given him.

"Sec. 2. Resident vice-presidents. Resident vice-presidents shall have power and authority to sign and execute on behalf of the company any and all bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature thereof, and to bind the company thereby as fully and to the same extent as the president could bind it."

STATE OF NEW YORK,
City and County of New York, ss:

I, Wm. I. Hawks, asst. secretary of the National Surety Company, do hereby certify that the above and foregoing is a full, true and cor-

POOR COPY

rect copy of a by-law adopted by the board of directors of said company at a meeting held on the fourth day of February,
438 1908, as the same appears upon the records of the company now in my possession and custody as asst. secretary.

In witness whereof I have hereunto set my hand and affixed the seal of said company, at the city of New York, this 13th day of April, A. D. 1908.

[SEAL.] WM. I. HAWKS, *Asst. Secretary.*

STATE OF NEW YORK,
City and County of New York, ss:

I, Wm. I. Hawks, asst. secretary of the National Surety Company, of New York, do hereby certify that the above and foregoing is a full, true, and correct copy of an instrument executed by said National Surety Company on the 13th day of April, evidencing the appointment of A. L. Fraser as resident vice-president of said company at Chicago, Illinois, and the power and authority upon him conferred by said company.

In witness whereof I have hereunto set my hand and affixed the seal of said company at the city of New York this 4th day of June, 1908.

[SEAL.] WM. I. HAWKS, *Asst. Secretary.*

439 NATIONAL SURETY COMPANY.

Certificate of appointment of resident assistant secretary.

Know all men by these presents that H. L. Bohannan has been and is hereby appointed resident assistant secretary of the National Surety Company, at Chicago, Ill., and as such resident assistant secretary has power and authority to seal and attest on behalf of the company any and all bonds, and all bonds sealed and attested by him, when signed by the president, vice-president, second vice-president, or a resident vice-president, shall be as valid and binding upon the company as if said bonds had been sealed and attested by the secretary.

Said appointment is made under and by authority of a certain by-law adopted by the board of directors of said National Surety Company at a regular meeting duly called and held on the sixth day of February, 1900, a certified copy of which is hereto attached and is subject to revocation as therein provided.

In testimony whereof the National Surety Company has caused these presents to be signed by its vice-president, and its corporate seal to be hereto affixed, duly attested by its asst. secretary, this 5th day of July A. D. 1906.

[SEAL.] WILLIAM J. GRIFFIN,
Vice President.

Attest:
GILBERT CONGDON,
Asst. Secretary.

440 STATE OF NEW YORK,
County and city of New York, ss.

On this 5th day of July A. D. 1906 before me appears William J. Griffin, asst. president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, says that he is vice-president of the National Surety Company; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by the order of the board of directors of said company, and that he signed said instrument as vice-president of said company, by like authority. The said William J. Griffin further says that he is acquainted with Gilbert Congdon and knows him to be the asst. secretary of said company; that the signature of said Gilbert Congdon subscribed to the said instrument, is in the genuine handwriting of the said Gilbert Congdon and was thereto subscribed by like order of the said board of directors.

[SEAL.] B. W. MYERS.
Notary Public No. 85 for Kings County.

Certificate filed in New York, Queens, and Westchester counties.

441 *Copy of by-law.*

Be it remembered that at a meeting of the board of directors of the National Surety Company, duly called and held on the sixth day of February, 1900, a quorum being present, the following by-law was adopted:

"Article XII, section 1. The president, vice-president, or second vice-president may from time to time appoint resident vice-presidents, resident assistant secretaries, and attorneys in fact, to represent and act for and on behalf of the company; and either the president, vice-president, second vice-president, the board of directors, or the executive committee may, at any time, remove any such resident vice-president, resident assistant secretary, or attorney in fact, and revoke the power and authority given him.

"Sec. 3. Resident Assistant Secretaries. Resident assistant secretaries shall have power and authority to affix the seal of the company to, and attest, on behalf of the company, any and all bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature thereof, and to bind the company thereby as fully and to the same extent as the secretary could bind it."

STATE OF NEW YORK,
County and City of New York, ss.

I, Gilbert Congdon asst. secretary of the National Surety Company, do hereby certify that the above and foregoing is a full, true, and correct copy of a by-law adopted by the board of directors of said company, at a meeting held on the sixth day of Feb-
442 ruary, 1900, as the same appears upon the records of the company now in my possession and custody as asst. secretary.

In witness whereof I have hereunto set my hand and affixed the seal of said company at the city of New York, this 5th day of July, A. D. 1906.

[SEAL.] GILBERT CONGDON,
Asst. Secretary.

STATE OF NEW YORK,
City and County of New York, ss.

I, Wm. I. Hawks, asst. secretary of the National Surety Company, of New York, do hereby certify that the above and foregoing is a full, true, and correct copy of an instrument executed by said National Surety Company on the 5th day of July, evidencing the appointment of H. L. Bohannan as resident assistant secretary of said company at Chicago, Ill., and the power and authority upon him conferred by said company.

In witness whereof I have hereunto set my hand and affixed the seal of said company at the city of New York this 7th day of April, 1908.

[SEAL.] WM. I. HAWKS,
Asst. Secretary.

The within bond and the surety thereon are hereby approved.

WALTER H. SANBORN,
U. S. Circuit Judge.

ST. PAUL, *July 18, 1908.*

443 (Endorsed:) Bond of complainants on temporary injunction for $100,000.00. Filed July 18th, 1908. Henry D. Lang, clerk.

444 UNITED STATES OF AMERICA.

Circuit Court of the United States, District of Minnesota. Third Division.

I, Henry D. Lang, clerk of said Circuit Court, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing, consisting of 444 pages, numbered from 1 to 444 inclusive, is a true and complete transcript of the records, process, pleadings, orders, decree, and all other proceedings in said cause and of the whose thereof, as appears from the original records and files of said court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand, and affixed the seal of said court, at Saint Paul, in the District of Minnesota, this 31st day of August A. D. 1908.

[SEAL.] HENRY D. LANG, *Clerk.*

445 Circuit Court of the United States, District of Minnesota, Third Division.

ALPHEUS B. STICKNEY ET AL. *vs.* THE INTERSTATE COMMERCE COMMISSION.	Præcipe for supplemental return to U. S. Supreme Court.

To the clerk of the above named court:

Please make a supplemental return upon the appeal in the above entitled cause and include therein all the records and proceedings in said cause subsequent to the transcript upon said appeal heretofore made.

CHAS. C. HOUPT,
U. S. District Attorney.

(Indorsed:) United States Circuit Court, District of Minnesota, 3rd Division. A. B. Stickney et al. *vs.* The Interstate Commerce Commission. Præcipe for supplemental return to U. S. Supreme Court. Filed October 27th, 1908. Henry D. Lang, clerk.

446 United States Circuit Court for the District of Minnesota. Term minutes, June term, A. D. 1908. October 26th, 1908.

Monday morning. Court opened pursuant to adjournment.

Present: Hon. Walter H. Sanborn, Hon. Willis Van Devanter, circuit judges. Henry D. Lang, clerk.

ALPHEUS B. STICKNEY AND CHARLES H. F. Smith, receivers of the Chicago Great Western Railway Company, Chicago Great Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Chicago & Alton Railroad Company, The Chicago, Rock Island & Pacific Railway Company, and The Atchison, Topeka & Santa Fe Railway Company.	No. 877, equity.
vs.	
THE INTERSTATE COMMERCE COMMISSION.	

It is by the court ordered, that the following paragraphs on page 10 of the opinion, which are hereto attached, marked "Exhibit A," be withdrawn, and that in place of them the following paragraphs, marked "Exhibit B," be inserted, to wit.

"EXHIBIT A.

"The defendant is a legislative commission empowered to discharge certain duties of a judicial character; among others to determine and prescribe what are just and reasonable rates for carriers of inter-

state commerce to charge for the different kinds of service which they are authorized to perform for the public; that is, to determine and prescribe what may be the maximum of their charges for through transportation, terminal storage, iceing, and other services incidental to transportation which they print or publish in their schedules to be performed by them.

"Being a commission of the character just represented, we perceive no reason why the courts may not at least treat its proceedings as they do the acts and proceedings of other quasi-judicial bodies, created to perform executive or legislative acts involving inquiry into facts and application of law thereto. The finding of facts on controverted and conflicting evidence by such bodies, when not brought about by fraud or mistake, is generally conclusive and ought not to be disturbed by the courts; but when facts found, conceded, or established without dispute admit of but one legal conclusion, and a different and erroneous one is reached by reason solely of a misconception and misapplication of law by such bodies, their action is subject to review, and may and ought to be avoided by the courts. (James v. Germania Iron Co., 46 C. C. A. 476; 107 Fed. 596; Johnson v. Towsley, 13 Wal. 72; Moore v. Robbins, 96 U. S. 530.)"

447 EXHIBIT B.

The defendant is a legislative commission empowered to discharge certain legislative duties; among others, to determine and prescribe what are just and reasonable rates for carriers of interstate commerce to charge for the different kinds of service which they are authorized to perform for the public; that is, to determine and prescribe what may be the maximum of their charges for through transportation, terminal storage, iceing, and other services incidental to transportation which they print or publish in their schedules to be performed by them.

Being a commission of the character mentioned, we at least perceive no reason for giving its proceedings and conclusions greater efficacy than is accorded to those of quasi-judicial bodies, created to perform duties involving inquiry into facts and application of law thereto. The finding of facts on controverted and conflicting evidence by such bodies, when not brought about by fraud or mistake, is generally conclusive and ought not to be disturbed by the courts; but when facts found, conceded, or established without dispute admit of but one legal conclusion, and a different and erroneous one is reached by reason of a misconception and misapplication of law by such bodies, their action is subject to review, and may and ought to be avoided by the courts. (James v. Germania Iron Co., 46 C. C. A. 476, 107 Fed. 596; Johnson v. Towsley, 13 Wal. 72; Moore v. Robbins, 96 U. S. 530.)

A true record.

Attest: HENRY D. LANG, *Clerk.*

448 In the Circuit Court of the United States within and for the District of Minnesota, Third Division.

ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, receivers of the Chicago Great Western Railway Company, Chicago Great Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Chicago & Alton Railroad Company, The Chicago, Rock Island & Pacific Railway Company, and The Atchison, Topeka & Santa Fe Railway Company, complainants,
vs.
THE INTERSTATE COMMERCE COMMISSION, DEFENDANT. } In equity.

Mr. William D. McHugh for complainants.
Mr. L. A. Shaver and Mr. Samuel H. Cowan for defendant.
Before Sanborn, Hook and Adams, circuit judges.

449 ADAMS, Circuit Judge, delivered the opinion of the court.

This is a bill in equity brought by the railroad companies, which are complainants, against the Interstate Commerce Commission to enjoin the enforcement of an order made by the latter requiring them to desist from charging two dollars per car for transporting live stock brought from outside the State of Illinois, from the ends of their roads in Chicago to the Union Stock Yards, and not to exact for that service hereafter a greater sum than one dollar per car. The present submission is on a motion for a temporay injunction based on the bill, answer filed thereto, and exhibits filed with both, to restrain the enforcement of that order or to suspend its operation until a final hearing can be had on the merits. The case is brought on for hearing before three circuit judges by virtue of a certificate of the Attorney-General made pursuant to the provisions of sec. 16 of the amended interstate commerce act (34 Stat., part 1, 584) and the act of February 11, 1903 (32 Stat., part 1, 823).

The pleadings and exhibits disclose that since the year 1894 the Interstate Commerce Commission has frequently had the question of the above mentioned terminal charge before it and has repeatedly ordered its reduction from two dollars per car to one dollar per car. Under the original interstate commerce act of 1887 (24 Stat., 379), the orders of the commission were not self-executing, but required compulsory orders to that effect by a court of competent jurisdiction. Upon the railroads declining to obey the first order to reduce the charge the commission instituted a proceeding in the Circuit Court of the United States for the Northern District of Illinois to secure its enforcement. The trial court decided in favor of the commission but its judgment was reversed on appeal by the Circuit Court
450 of Appeals for the Seventh Circuit. (Walker v. Keenan, 19

C. C. A., 668, 73 Fed., 755.) Afterwards, upon a new case made the commission again entered an order reducing the terminal charge from two dollars to one dollar and again sought its enforcement in the Circuit Court. Both the Circuit Court and the Circuit Court of Appeals for the Seventh Circuit decided against the commission and refused to enforce it. (Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 43 C. C. A., 209, 103 Fed., 249.) Upon an appeal from the judgment of the Court of Appeals in the last mentioned case the Supreme Court of the United States, in 1902, affirmed its judgment. (Inter. Com. Commis'n v. Chicago, &c. R'd Co. 186 U. S., 320.)

In February, 1903, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange filed a petition asking the commission to open up the case again to enable them to conform to certain observations made by the Supreme Court. This was done, and resulted in a third order by the commission requiring the railroads to desist from exacting the terminal charge of two dollars. This decision was rendered in August, 1905. Nothing further seems to have been done until December 3, 1906, when after the passage of the amendment to the interstate commerce act, approved June 29, 1906 (34 Stat., 584, part 1), known as the Hepburn Act, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exhange again complained to the commission that the complaining railroad companies had violated the provisions of the interstate commerce acts in laying the charge of two dollars per car for the terminal service in question in Chicago. We suppose this additional proceeding was inspired by the Hepburn Act, which made the orders of the commission conclusive, subject only to a court review as provided for by the fifteenth and sixteenth sections of the interstate commerce act as
451 amended. On October 21, 1907, the commission again decided that the terminal charge of two dollars per car was unjust and unreasonable, and thereafter, to wit, on December 10, 1907, made an order that such charge should not exceed one dollar per car, and fixed February 1, 1905, as the date when the order should go into effect. Under the new law (34 Stat., 584, part 1, secs. 15 and 16) this order became effective proprio vigore at the time fixed by the commission therefor, and required obedience under heavy penalties unless upon review by the courts at the instance of the railroads it should be enjoined, set aside, annulled, or suspended.

Availing themselves of the right accorded by the act the railroad companies now appeal to this court for relief against that last order.

In view of protracted history of this case we find it unnecesary to restate many of the facts. By referring to the opinions of the courts already cited, and particularly to that of the Supreme Court of the United States in Inter. Com. Coms'n v. Chicago, &c., R'd Co. (supra), all essential detail can be found. For our present purposes it is sufficient to say that it stands conceded by the pleadings that the actual cost to complainants of carrying live stock from their respective terminal yards at the ends of their lines or roads in Chicago

to the Union Stock Yards exceeds the sum of two dollars per car. This expenditure is for trackage from the ends of their rails over the track of the Union Stock Yards & Transit Company and making deliveries of the stock at the stock yards, and is for a service totally distinct and separate from that involved in the transportation over their own lines to the ends of their rails. As such terminal service it was required by the original interstate commerce act (24 Stat., 379, sec. 6), and by the amended act of June 29, 1906 (34 Stat., 584,
452 part 1, sec. 6), that it should be separately scheduled by the carriers. The original act provided that the published schedules of rates, fares, and charges "shall also state separately the terminal charges," and the amended act emphasized this requirement by the use of the following language: "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers shall be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges or the values of the service rendered the passenger, shipper, or consignee."

Prior to 1894 the railroad companies made no additional charge for transporting live stock from their own terminals in the city of Chicago and delivering the same to the Union Stock Yards. The rate fixed and charged for transportation from the points of origin of the freight to the ends of their own rails in Chicago included all the compensation they received for the service of delivery at the Stock Yards, but in that year the Union Stock Yard & Transit Company made a trackage charge for the use of its tracks for that service ranging from eighty cents to one dollar and fifty cents per car, according to the extent of the track used by the different roads respectively. This additional burden and the enhanced complexity and general cost of the special service according to the averments of the bill "made it impracticable to continue to make deliveries beyond the lines of their respective railroad tracks without any charge or
453 compensation therefor." For these reasons, as averred, the railroad companies laid a charge for it of one uniform price of two dollars per car and undertook to conform their published schedule of rates and charges thereto. This was the condition of things as the case stood when heard by the Court of Appeals for the Seventh Circuit and the Supreme Court. The Court of Appeals twice justified the imposition of the extra charge on the ground generally speaking, that the carriers had a right to segregate the terminal charge in question from the other rates over their main lines and had done so and that they had a right to make an additional charge not exceeding the cost thereof for that service and that the charge of two dollars a car as laid was just and reasonable and should be sustained. See cases supra.

The Supreme Court held that the carriers had the right to divide their rates so as to make a distinct charge for service from the point of shipment to Chicago and a separate charge for service in transporting and delivering live stock from their own terminals to the Union Stock Yards, but held that they had not made such a division by any such clear and plain statement as is required by the interstate commerce law. After referring to the provision of law requiring the separate statement of terminal charges the court said: "The purpose of this provision was to compel the schedules to be so drawn as to plainly inform of their import, was to exact that when the rates were changed the change should be so stated as not to mislead and confuse." The conclusion reached was that the carriers in this case had not made the required division and separate statement of their terminal charges; that all they had done was to add the sum of two dollars to the prior through rate, which up to that time had embraced the terminal charge. Mr. Justice White, speaking for the court
454 said: "We think that it cannot be said that to add an additional amount to a former charge was necessarily to divide such former charge without holding that to add one sum to another is necessarily to divide the other." Notwithstanding this conclusion the judgment of the Court of Appeals was affirmed on other grounds. The opinion concludes as follows: "We think, however, in view of what has been said, and in order to prevent all possible misconception, that it should be stated that nothing in the decree refusing to execute the order of the commission should be construed as preventing that body, if it deems it best to do so, from hereafter commencing proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory to which the reduction referred to in the opinion, if any such there be, did not apply."

Adopting the suggestion of the Supreme Court the carriers soon thereafter made an amendment of their published and filed schedules and by clear and unequivocal language segregated the terminal service from the transportation over their main lines to Chicago, and definitely fixed the rate for the separated terminal service at two dollars per car.

In view of the right and duty of the carriers to make a segregation and of the fact that one has been actually made and of the further fact that the charge laid for the separate terminal service is in itself just and reasonable, not more than the actual cost thereof, it would seem to follow that it should not be reduced. Neither the commission in its reports nor learned counsel in their argument attempt to justify the reduction on the ground that the charge as actually laid was too much for the particular service rendered, but solely on the ground that if the charge of two dollars a car for the terminal service should be allowed, even though it be only
455 a just and reasonable compensation therefor, the result would be that the rate from the origin of shipment to the ends of the rails in Chicago would become too high, and thereby the cost of trans-

portation from the origin of shipments to the Union Stock Yards would be excessive.

It is said that the carriers for many years before 1894 made no separate charge for the terminal service in question, but absorbed it in the through rate and that the present published and filed rate for the service on the main lines only, that is, the service to the end of complainants' lines in Chicago, excluding the terminal service, is the same as it then was. The conclusion drawn is that because the carriers are now charging two dollars more than they once admitted was just and reasonable for the entire transportation, including the terminal service, the imposition of the terminal charge is a mere unwarranted addition to a just and reasonable charge and is accordingly in itself unjust and unreasonable.

The logic of this argument is somewhat impaired by the concession that the carriers may by reason of the trackage charge ranging from eighty cents to one dollar and fifty cents per car made by the Union Stock Yard & Transit Company, add to the through rate the arbitrary sum of one dollar per car for a terminal charge. If the old through rate is not conclusive of the reasonableness of the terminal charge it is obviously left open to every consideration affecting its reasonableness; not only the trackage charge but the other facts which create the complexity and affect the general cost of the terminal service referred to in the bill should be considered.

The interstate commerce law confers the power upon carriers to determine for themselves the rate of freight between points on
456 their lines and the terminal and other charges which they will make for services beyond their lines incident to transportation and imposes upon them the duty of stating them separately in their schedules which are required to be published for the information of patrons. Carriers may in this manner make such propositions for business as they please, but when they make them they must, until they are changed by themselves or by the commission, strictly observe them or suffer the pains and penalties of the law for disobedience. In the exercise of their power and obedient to their legal duty the carriers fixed and published the terminal charge in question, for service beyond their lines rendered necessary to complete the transportation undertaken by them. They made this a separate matter as they had the undoubted right under the law to do, and, in our opinion, neither the commission nor the courts have a right to complicate it with any other service in determining the reasonableness of a charge fixed for it.

The various provisions of the interstate commerce law requiring separate statements and schedules of all kinds of service and imposing penalties for failure to observe them seems to us to necessarily place them apart and make each stand by itself when assailed as unlawful. This, of course, does not prevent consideration of all pertinent surrounding circumstances when any particular service is drawn in question.

It follows, we think, that the reduction of the terminal charge below its cost or below its just and reasonable value for the purpose of correcting the through rate was erroneous. The commission, in our opinion, had no power after the legal separation of the two services to make the terminal charge unreasonably low merely because the tariff for the through rate was unreasonably high. If the latter were true the remedy was to reduce it by a direct pro-
457 ceeding instituted for that purpose rather than by the indirection involved in reducing the charge for another connecting but separate service which was just and reasonable in itself. On the conceded facts of this case we think the commission misconstrued the law.

But it is argued that the power to prescribe maximum rates for service is conferred upon the commission exclusively; that when in its opinion an existing rate is unreasonable the power to prescribe a maximum rate for two years to come arises, and whether the opinion reached by the commission be right or wrong, that it is not under any circumstances reviewable by the courts.

With this contention we find ourselves unable to agree.

As a result of the well remembered protracted and able debates in Congress when the Hepburn bill was under consideration, concerning the question of a judicial review of the work of the commission, the following provisions were embodied in the act:

"Sec. 15. All orders of the commission except orders for the payment of money shall take effect within such reasonable time not less than thirty days, and shall continue in force for such period of time not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by a court of competent jurisdiction.

"Sec. 16. The venue of suits brought in any of the courts of the United States against the commission to enjoin, set aside, annul or suspend any order or requirement of the commission shall be in the district," etc., * * * "and jurisdiction to hear and determine such suits is hereby vested in such courts," * * * * "pro-
458 vided that no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the commission shall be granted except on hearing after not less than five (5) days' notice to the commission."

The defendant is a legislative commission empowered to discharge certain legislative duties, among others, to determine and prescribe what are just and reasonable rates for carriers of interstate commerce to charge for the different kinds of service which they are authorized to perform for the public; that is, to determine and prescribe what may be the maximum of their charges for through transportation, terminal storage, icing and other services incidental to transportation which they print or publish in their schedules to be performed by them.

Being a commission of the character mentioned we at least perceive no reason for giving its proceedings and conclusions greater

efficacy than is accorded to those of quasi judicial bodies, created to perform duties involving inquiry into facts and application of law thereto. The finding of facts on controverted and conflicting evidence by such bodies when not brought about by fraud or mistake is generally conclusive and ought not to be disturbed by the courts; but when facts found, conceded or established without dispute admit of but one legal conclusion and a different and erroneous one is reached by reason of a misconception and misapplication of law by such bodies, their action is subject to review and may and ought to be avoided by the courts. (James v. Germania Iron Co., 46 C. C. A., 476; 107 Fed., 596; Johnson v. Towsley, 13 Wal., 72; Moore v. Robbins, 96 U. S., 530.)

We refrain from expressing any opinion concerning what other jurisdiction, if any, is conferred upon this court by the broad
459 and comprehensive language of the Hepburn Act authorizing it "to enjoin, set aside, annul or suspend any order or requirement of the commission." All we are required now to hold and all we do hold is that this court has ample jurisdiction to set aside or suspend any order of the commission resulting from a misconception and misapplication of a law to conceded or undisputed facts.

Applying the foregoing doctrine to the facts of this case we think the learned commission fell into a mistake of law in attempting to correct the through rate by reducing the terminal charge itself below its just and reasonable value. That being a separable and separate service, actually segregated by proper action of the carriers from the rate over their main lines, it must, in our opinion, stand or fall upon its own merits, irrespective of whether the other rates are in themselves just and reasonable. If they are not just and reasonable, appropriate proceedings should be instituted to make them so. Such, we think, is the meaning of the Supreme Court expressed in the latter part of its opinion in Int. Com. Comm. v. Chicago, etc., R. Co. (supra). It there reserved the right to the commission "to commence proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge," etc. If by the separation of and separate charge for the terminal service the balance of the rate from the origin of shipment to the Stock Yards is in the light of former charges or for any other reason too high, the remedy should be applied directly to it without disturbing the rate, which is not too high.

Counsel for the commission again suggest rather than seriously argue, we think, that no rate prescribed by the commission for any service can be set aside or suspended unless the complaining carriers make it appear that the enforcement of the rate challenged will render the business of the carriers throughout their whole line un-
460 profitable. Our attention is called to the case of St. L. & San Francisco Railway v. Gill, 156 U. S., 649, as authority for this suggestion. Without stopping to analyze the Gill case to show its inapplicability to the case before us or to consider the proposition advanced by counsel at any length, we content ourselves by saying

that it seems utterly untenable. The provision of the interstate commerce law requiring carriers to segregate certain incidental services rendered by them from the principal service of transporting merchandise over the main lines of their roads and requiring them to affix thereto a distinct and separate charge which in itself must be just and reasonable is inconsistent with counsel's suggestion. We can not conceive that Congress ever intended by the legislation in question to subject railroad companies to the necessity of an accounting concerning all their business throughout their entire lines in order to securing proper compensation for an icing, elevating, or terminal service. An intention involving such an impracticable result should not be lightly imputed to Congress.

Some other arguments are made in support of the contentions of each side, all of which have received careful consideration, but as the result reached by us necessarily follows from what has already been said, we refrain from prolonging this discussion further. The temporary injunction prayed for, suspending until the further order of this court the order of the commission reducing the terminal charge in question from two dollars to one dollar, will be made; but we will require as a protection to shippers that the several complainants keep an accurate record showing the number of cars of live stock transported by them respectively over the terminal road in question to the Union Stock Yards, together with the dates of such transportation, the names of the respective consignors
461 and consignees, the charges made by the respective complainants for such terminal service and other charges prescribed therefor at the time such service may be rendered by the Interstate Commerce Commission, and hold the same subject to such orders as this court may hereafter make with respect thereto. We shall also require that complainants furnish a bond in the penal sum of $100,000.00 conditioned that they will comply with the orders made upon them and pay such damages as shippers may sustain by reason of the injunction.

(Endorsed:) Decision on motion for temporary injunction. Filed June 30th, 1908. Henry D. Lang, clerk.

462–6 UNITED STATES OF AMERICA.

Circuit Court of the United States, District of Minnesota, Third Division.

I, Henry D. Lang, clerk of said Circuit Court, do hereby certify and return to the honorable, the Supreme Court of the United States, that the foregoing, consisting of 17 pages, numbered from 1 to 17 inclusive, is a true and complete transcript of all the records and proceedings in said cause, subsequent to the transcript upon appeal heretofore transmitted to the Supreme Court of the United States and of the whole thereof, as appears from the original records and

files of said court, and that this transcript is and constitutes a supplemental return upon the appeal in said cause.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at Saint Paul, in the District of Minnesota, this 27th day of October, A. D. 1908.

[SEAL.] HENRY D. LANG, *Clerk*.

467 (Indorsed:) United States Circuit Court, District of Minnesota, 3rd Division. A. B. Stickeny et al., *vs.* The Interstate Commerce Commission, defendant. Supplemental Return upon Appeal to the U. S. Supreme Court. Office of the clerk Supreme Court U. S. Received Oct. 29, 1908.

468 In the Supreme Court of the United States, October term 1908.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,
v.
A. B. STICKNEY, ET AL., APPELLEES. } No. 533.

STIPULATION.

It is hereby agreed by counsel for the respective parties in the above entitled cause that the corrected copy of the opinion of the Circuit Court of the United States for the District of Minnesota in this cause be substituted for and printed in the place of the opinion embodied in the transcript of record.

HENRY M. HOYT,
Solicitor-General.

L. A. SHAVER,
Solicitor for Appellant.

W. D. MCHUGH,
Solicitor for Appellees.

469 (Indorsed:) File No. 21329. Supreme Court U. S., October term, 1908. Term No. 533. The Interstate Commerce Commission, app't, *vs.* A. B. Stickney et al., receivers, &c., et al. Stipulation to substitute corrected copy of opinion of Circuit Court for the copy sent up with transcript of record & copy of corrected opinion. Filed Nov. 19th, 1908.

470 In the Supreme Court of the United States, October Term, 1908.

INTERSTATE COMMERCE COMMISSION, APPELLANT,
v.
A. B. STICKNEY ET AL., APPELLEES. } No. 533.

STIPULATION.

It is hereby stipulated and agreed by and between the parties that the exhibits attached to the record herein need not be printed in full

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in the record, each party having the right, however, to refer thereto with the permission of the court.

In order to avoid the printing of said exhibits, it is hereby stipulated that the freight tariff of the Chicago & Alton Railroad Company attached as an exhibit to the affidavit of Walter L. Ross is on its face a freight tariff applying on live stock in carloads between stations outside of Illinois, and among other places, "Brighton Park (Chicago) Ill.," and that in said tariff there is the following provision:

"Application of rates.

"Shipments to and from the Union Stock Yards district, Chicago.

"Shipments consigned to or received from Union Stock Yards, Chicago, Ill., or industries located on the tracks of the Union Stock Yards R'y, will, in addition to the rates named in this tariff, be subject to a delivery charge of $2.00 per car, and $1.50 per car on shipments received from or delivered to the Northern Indiana R. R. at Hammond, Ind.

"Agents must insert the above charge in all shipping receipts, bills of lading, waybills, and stubs; or live stock contracts for shipment consigned to or coming from industries specified, showing same as a separate item in addition to the tariff rate to or from Brighton Park."

That the freight tariff of the Chicago, Rock Island & Pacific Railway Company attached as Exhibit A to the affidavit of M. A. Peterson has the following provision:

471 "94th Street Stock Yards, Chicago, Ill. The rails of Chicago, Rock Island & Pacific Railway do not reach Union Stock Yards, Chicago, Ill. The C., R. I. & P. Stock Yards at Chicago, Ill., are located at 94th street, and the Chicago rates named herein cover transportation charges between stations named and C., R. I. & P. 94th Street Stock Yards. (Reissue.)

"Shipments to or from Union Stock Yards, etc. Charges as follows must be made in addition to the regular tariff rates on all C. L. shipments of freight (except on dressed beef and packing house products) received from or delivered to industries located on the tracks of the following roads:

"Chicago Junction R'y (Union Stock Yards and Indiana State Line Divisions), Chicago, $2.00 per car.

"Northern Indiana R. R., Hammond, Ind., $1.50 per car. (Reissue.)

"Agents should be particular to see that shipments are waybilled to the Union Stock Yards, Chicago, or to Washington Heights (when for 94th Street Stock Yards), as directed by shippers. (Reissue.)"

That in the freight tariff of the Illinois Central Railroad Company attached to affidavit of W. E. Keepers there is the following provision:

"To and from Union Stock Yards.

"The rates on live stock, carloads, published in tariff as amended, to and from Chicago, Ill., will apply when delivered to or shipped from this company's stock yards at Hawthorne, Ill., or Fordham, Ill., and do not include the cost of delivery to or from the Union Stock Yards, Chicago, Ill.

"The terminal charge provided for in I. C. R. R. Tariff No. 1–A, I. C. C. No. A–5950 or subsequent issues, will be assessed in addition to the rates published in this tariff on live stock, carloads, delivered in or shipped from the Union Stock Yards, Chicago, Ill.

"Agents will insert in live stock contracts for shipments destined to or shipped from the Union Stock Yards, the additional terminal charge referred to in the foregoing paragraph, as provided in I. C. R. R. Tariff No. 1–A, I. C. C. No. A–5950 or subsequent issues. (File M–320—U. S. Yds.)"

That the tariff of the Chicago, Milwaukee & St. Paul Railway Company attached as Exhibit A to the affidavit of J. H. Hiland is on its face a tariff on live stock in carloads between "Chicago, Ill. (Galewood Stock Yards)," and other stations, and said tariff contains the following provision:

"Terminal charge.

"Note.—This company's railway does not reach the Chicago Union Stock Yards, and the rates given herein cover the transportation charges between the stations named and Galewood, Ill., Stock Yards, only.

"$2.00 per car in addition will be charged on live stock, carloads, when consigned to or from the Chicago Union Stock Yards. This terminal charge must be entered separately by waybilling agent in 'freight charge' column of waybill, also inserted on bill of lading and live stock contract."

That the tariff of the Chicago, Burlington & Quincy Rail-
472 road Company attached as Exhibit B to the affidavit of George H. Crosby, is on its face a tariff on live stock between "Chicago (Company's Stock Yards at Hawthorne)" and other stations. That throughout the said tariff, wherever the word "Chicago" is used by appropriate reference, attention is called to a footnote as follows:

"These rates apply only to and from company's stock yards at Hawthorne, Ill. See last note, page 69, for further information."

On page 69 of said tariff is the following provision:

"Live stock to or from Union Stock Yards, Chicago, Ill."

"The rates herein published do not include delivery in Union Stock Yards, Chicago, Ill., and live stock under these rates will be delivered to and taken from the company's stock yards at Hawthorne, Ill.

"In case delivery is desired in the Union Stock Yards, Chicago, or shipments are made therefrom, a terminal charge of $2.00 per car will be made for that service, which will be added to the rates herein published to and from Chicago.

"Agents in issuing live stock contracts for shipments destined to or from Union Stock Yards must insert the terminal charge in live stock contract, in addition to the rate to and from Chicago."

That the tariff of the Atchison, Topeka & Santa Fe Railway attached as Exhibit A to the affidavit of C. B. Strohm, is, on its face, a tariff on live stock between certain stations, and "Chicago (Corwith Station)."

That said tariff contains the following provision:

"Important—terminal charges.

"The live-stock station and stock yards of the A., T. & S. F. Ry. Co., in Chicago, are located at Corwith, and the rates named herein as applicable to Chicago only apply to live stock intended for delivery at the stock yards of said company at Corwith in said city.

"Upon all live stock consigned to the Union Stock Yards in Chicago or to industries located on the Union Stock Yards Railway or the Indiana State Line Railway (Chicago Junction Railway, lessee), and transported and delivered to said Union Stock Yards or to said industries located on said Union Stock Yards Railway or the Indiana State Line Railway aforesaid, an additional charge of two dollars ($2.00) per car will be added to the rates applicable to Corwith, for transporting such cars to said Union Stock Yards or to said industries on said Union Stock Yards or the Indiana State Line Railway, for delivery thereat; and one dollar and a half ($1.50) per car as a terminal charge will be made in addition to the Chicago rates on shipments received from or delivered to the Northern Indiana Railroad at Hammond.

"The attention of the shipper must be and is called to the fact that the transportation charge on live stock delivered at our own
473 yards at Corwith in Chicago will be two dollars ($2.00) per car less than when delivered at the Union Stock Yards at Chicago, or at industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and the agent should ascertain definitely at which point the shipper desires delivery to be made. The live-stock contract must then be filled out so as to show the correct destination and rate as provided by the tariff and amendments.

"Care must also be taken to have the stock correctly billed, either to Corwith in Chicago, or Union Stock Yards at Chicago, or industries located on the Union Stock Yards Railway or the Indiana State Line Railway, as designated by the shipper, and the correct rate shown in the billing.

"Bills of lading covering freight to and from the Union Stock Yards, or industries located on the Union Stock Yards Railway or

the Indiana State Line Railway must provide for the above terminal charges.

"In waybilling shipments destined to or coming from the Union Stock Yards, etc., the terminal charges, if any, must be shown separately in the freight column."

It is further stipulated and agreed that in all of the waybills attached as exhibits to the various affidavits herein, the item of $2.00 charged for the terminal services is entered separately from the freight charge.

It is further stipulated and agreed by and between the parties hereto that this stipulation may be printed in the record, the purpose of the stipulation being to avoid the printing of those portions of the said exhibits which have no bearing upon the issues to be decided herein.

L. A. SHAVER,
Solicitor for Appellant.
WILLIAM D. MCHUGH,
Solicitor for Appellees.

474 (Indorsed:) File No. 21,329. Supreme Court U. S., October term, 1908. Term No. 533. The Interstate Commerce Commission, appellant, vs. A. B. Stickney et al, receivers, &c., et al. Stipulation as to printing records. Filed Dec. 21st, 1908.

(Indorsement on cover:) File No. 21,329. Minnesota C. C. U. S. Term No. 533. The Interstate Commerce Commission, appellant, vs. Alpheus B. Stickney and Charles H. F. Smith, receivers of The Chicago Great Western Railway Company et al. Filed September 9th, 1908. File No. 21,329.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

INTERSTATE COMMERCE COMMISSION
v.
A. B. STICKNEY ET AL. } No. 533.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION.

MOTION TO ADVANCE.

On behalf of the appellant the Solicitor-General respectfully moves the court to advance the above-entitled cause for hearing during the present term, for the following reasons:

1. This is an appeal by the Interstate Commerce Commission from an interlocutory order of injunction granted by the Circuit Court of the United States for the District of Minnesota in a suit brought by A. B. Stickney and others under the provisions of section 16 of the act to regulate commerce, as amended and approved June 29, 1906, and enjoining the enforcement of an order of the Interstate Commerce Commission prescribing a charge of $1 per car as the maximum charge

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to be made for the delivery of live stock in the Union Stock Yards at Chicago by the plaintiff railway companies.

2. The act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, in section 16, makes the provisions of "An act to expedite the hearing and determination of suits in equity," etc., approved February 11, 1903, applicable to all such suits, and said section provides that cases of this character shall have in this court "priority in hearing and determination over all other causes except criminal causes."

I am authorized to state that counsel for the appellees concur in this motion.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

v.

ALPHEUS B. STICKNEY AND CHARLES H. F. Smith, Receivers of the Chicago Great Western Railway Company; Chicago Great Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Illinois Central Railroad Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; The Chicago & Alton Railroad Company; The Chicago, Rock Island & Pacific Railway Company; and the Atchison, Topeka & Santa Fe Railway Company, Appellees. } No. 251.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR APPELLANT.

I.

STATEMENT OF THE CASE.

This suit was filed in the Circuit Court of the United States in and for the District of Minnesota, Third Division, on the 7th day of May, 1908, by the appellees, to enjoin an order of

the Interstate Commerce Commission, made October 21, 1907, and reissued on the 10th day of December, 1907, as follows:

> It is ordered that the defendants, The Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago, Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company; and Illinois Central Railroad Company, be, and they are hereby, required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car.
>
> It is further ordered that said defendants be, and they are hereby, notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the State of Illinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them.

On May 11, 1908, the Attorney-General filed his certificate to expedite the hearing of the case under the acts of February 11, 1903, and June 29, 1906, and on the 28th day of June, 1908, the defendant filed its answer (Rec., 34) in said cause, denying all the equities of the bill, attaching as exhibits the decision, report, and opinion of the Commission on which the order was based (Rec., 43–51), and the same came on for hearing upon bill and answer and supporting affidavits and exhibits, before Circuit Judges Sanborn, Adams, and Hook, who, thereafter, on June 30,

1908, entered an interlocutory order, suspending the order of the Interstate Commerce Commission, enjoining the enforcement of the same, and requiring the railroads, parties to the action, to make and maintain a certain record with respect to the shipments of live stock to the Union Stock Yards, to give a bond to comply with the orders of the court, and to pay any damages sustained by shippers by reason of the injunction. (Rec., 67.)

From this interlocutory order the Commission now appeals to this court. (Rec., 74.)

The bill.

Briefly stated, the bill of complaint of the railroad companies, appellees, is as follows:

They allege that they had duly published their charges for the transportation of live stock to their own terminals in the city of Chicago; that these charges did not include any compensation for transportation beyond their own lines, and the delivery of the same to the Union Stock Yards; that this latter transportation and delivery involved a separate and distinct service; that after the Union Stock Yards were established, and until the year 1894, the appellees delivered live stock to such Union Stock Yards without any charge whatever; that in 1894, when the Union Stock Yards and Transit Company imposed against the appellees for the use of its tracks a trackage charge, varying from 80 cents to $1.50 per car, it became impracticable for the appellees to continue transporting live stock beyond their own lines and over the tracks of said Union Stock Yards and Transit Company, and delivering the same to the Union Stock Yards without charge, and they therefore issued, published, filed, and posted a separate tariff of $2 per car for the special service of transporting live stock beyond their lines and for making delivery thereof at the Union Stock Yards; that the appellees meant by this tariff that said charge of $2 was the sole and

only charge for said service; that the same was segregated and entirely separate from the through charge on live stock; that the cost of this terminal service ever since 1894 has exceeded the sum of $2 per car; that the order of the Interstate Commerce Commission reducing this charge to $1 was unjust, oppressive, and unlawful because $2 was less than the actual expense to the railroads and $1 was less than half such expense; that the Commission had already found that this terminal service cost the railroads more than $2 per car; and, finally, that the order of the Commission would deprive the railroads of their property without due process of law, in violation of the Constitution of the United States.

The railroads' bill of complaint did not contain or have attached a copy of the report or opinion of the Commission, or the evidence before it upon which its order was based.

The answer.

The Interstate Commerce Commission for answer denied the equities of the bill and recited the various proceedings (beginning with the first complaint of the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange in 1896), which finally led up to the order complained of in this case. The Commission asserted that its order was made after due and full hearing, and attached to its answer as Exhibit A the report and order of the Commission in the present case (Rec., 42), and as Exhibit B the report and order of the Commission in another proceeding involving the same subject-matter between substantially the same parties (Rec., 51).

The Commission further alleged that the $2 charge was not the only compensation received by the railroads for the service of transporting live stock to and delivering at the Union Stock Yards; that such charge and service were not segregated from the charge and service for the through transportation; that the $2 terminal charge was a mere addition

to the compensation already embraced in the through rate and was not imposed for the purpose of covering the cost of a particular part of the service, but was an arbitrary increase of the through rate for transporting the same freight and performing the same service that previously had been transported and performed without this additional charge, and that the appellees could not, by setting forth in their tariffs a statement that the $2 charge was for a special and separate service, alter the fact that it was a mere addition to the through rate.

The Commission denied that appellees had any adequate terminal facilities of their own for the delivery of live stock shipped to Chicago, and that the railroads pretended to have provided such facilities for the mere purpose of giving color to the claim that they had live-stock depots in Chicago other than the Union Stock Yards. The Commission alleged that the through rates in force prior to June 1, 1894 (when the $2 extra charge was imposed), were sufficiently high to include, did include and now includes, the delivery of live stock at the Union Stock Yards, and that there has been no increase in the expense of this delivery except the imposition of a trackage charge by the Union Stock Yards and Transit Company, which trackage charge would be fully covered by $1 per car

The Commission further alleged that the $2 charge imposed by the railroads constitutes an undue preference to other markets and an unjust discrimination against Chicago; that said charge was the result of a contract or combination between the railroad companies in restraint of trade, within the meaning of the antitrust act; and, finally, that the $2 charge imposed by the carriers is excessive and that no irreparable or material injury could result from the enforcement of the Commission's order.

Supporting proof to bill and answer.

The affidavits offered in support of the appellees' bill in the court below (Rec., pp. 20 to 33, inclusive) are made as to each railroad by some official thereof and are all to the effect that the companies construe their tariffs to mean that the through rates apply only to certain points on their own lines, respectively, in the vicinity of Chicago; that they do not apply to the Union Stock Yards; that the $2 charge is for transportation to and delivery at the Union Stock Yards beyond the tracks of the railroads; that the money received for such additional service is kept on the books of the companies separately from the account for receipts of money for transportation of live stock; and that the $2 charge constituted the only compensation for the service beyond their own rails and for delivery at the Union Stock Yards. The depots claimed by the companies to be the live-stock stations on their own lines in the vicinity of Chicago are, respectively, as follows (Rec., 95, 96): Of the Chicago, Burlington & Quincy, Hawthorne; of the Illinois Central, Hawthorne; of the Chicago, Milwaukee & St. Paul, Galewood; of the Chicago & Alton, Brighton Park; of the Chicago, Rock Island & Pacific, Ninety-fourth street; of the Atchison, Topeka & Santa Fe, Corwith.

In the tariffs (Rec., 95 to 98, inclusive) the railroads denominate the $2 charge in various ways, but in every instance it amounts to an addition to the through rate. For example, the Chicago, Burlington & Quincy tariff declares that the $2 "will be added to the rates herein published to and from Chicago;" the Chicago, Milwaukee & St. Paul tariff says $2 per car "in addition" will be charged; the Chicago & Alton uses the words "in addition to the rates named in this tariff;" the Chicago, Rock Island & Pacific, "in addition to the regular tariff rates;" the Atchison, Topeka & Santa Fe, "an additional charge of $2 per car will be added to the rates."

The Interstate Commerce Commission submitted, in connection with its answer, the exhibits thereto attached, Exhibit A being a report and opinion of the Commission dated October 21, 1907, on which the order on this question was issued (Rec., pp. 42 to 50) and Exhibit B being a report and opinion of the Commission in a previous proceeding involving the same controversy (Rec., pp. 51 to 64).

II.

ASSIGNMENT OF ERRORS.

The Commission assigned and here urges the following errors in the order and decree of the Circuit Court:

1. The court erred in not dismissing the bill because there is no equity in it;
2. The court was without jurisdiction;
3. No irreparable injury was shown;
4. There was no allegation or showing by the railroads that the terminal charge of $1 per car, together with the through rate on shipments of live stock, deprived them of property without due process of law;
5. The Commission was right as a matter of law in considering the through rate in connection with the terminal charge in order to determine the reasonableness of the latter;
6. There was no allegation or showing that the cost of the service of transporting live stock from the end of the carriers' rails to the Union Stock Yards, independent of the cost of unloading, the cost of maintaining delivery agencies, and the cost of returning empty cars, was more than $1 per car;
7. The court erred in holding that the carriers had segregated the terminal service and the terminal charge from the through service and the through rate;
8. The court erred in holding that the interstate commerce act requires a charge for terminal services to be separately scheduled, and that the Commission should have determined the reasonableness of such charge by the cost of the terminal service alone;

9. The court erred in holding that the Commission is without power to reduce or forbid a terminal charge, however reasonable in itself, when an adequate terminal charge is already embraced in the through rate.

III.

History of the controversy before the courts and the Commission.

This controversy has been going on for fifteen years. It has been the subject of five decisions in the lower federal courts and one decision in the Supreme Court.

The Interstate Commerce Commission has heard the complaints of the shippers and the defense of the railroads time and time again and has made five reports and orders on the subject, in each case holding that the terminal charge imposed by the railroads was excessive and unreasonable.

The controversy began in 1894, when the railroads imposed for the first time a terminal charge of $2 per car for the service of transporting live stock from the ends of their own rails in Chicago and delivering the same at the Union Stock Yards. From 1865, when the Union Stock Yards were constructed, to June 1, 1894, there was no charge for delivering live stock there. The Union Stock Yards, and the connection tracks leading to them, were built by the Union Stock Yards & Transit Company, a corporation organized by the railroads for their own convenience and for the purpose of establishing a single market for live stock. The result was that all the other markets were abandoned, slaughterhouses were located in the vicinity of the union yards, and these became the sole place in the city of Chicago, where cattle, sheep and hogs were marketed for slaughter. The railroad rate to Chicago carried with it, in all cases, delivery at the Union Stock Yards. As time went on the railroads parted with their interests in the stock yards company, and, in 1894, the control of the company had passed out of their

hands. Then the stock yards company imposed a trackage charge for the use of their rails by the carriers of an average of about $1 per car. The railroads tried in vain to prevent the imposition of this charge, and being unable to do so, they, in turn, imposed upon the shippers over their roads a charge of $2 per car for delivering live stock at the Union Stock Yards.

This extra charge by the railroads was imposed June 1, 1894. The first complaint to the courts was in the form of a proceeding by Keenan and others, shippers, against the receiver of the Atchison, Topeka & Santa Fe Railroad Company, appointed by the Circuit Court for the Northern District of Illinois. On November 26, 1894 (*Keenan et al.* v. *Receiver of A., T. & S. F. R. R. Co.*, 64 Fed., 992), the court ordered the receiver to discontinue the levying of any terminal charge, holding that the railroads were bound to carry to the Union Stock Yards, which was the live-stock depot in Chicago, for the one through rate. This case was reversed by the Circuit Court of Appeals upon the proposition that the railroads could, if they desired, make one charge for the transportation of freight to Chicago and another separate charge for delivery at the Union Stock Yards, and that there was no contention in the case that the amount of the terminal charge was unreasonable. (*Walker et al.* v. *Keenan et al.*, 73 Fed., 755.)

The first complaint to the Interstate Commerce Commission was made on September 1, 1896, by the Cattle Raisers' Association of Texas, and on March 10, 1897, by the Chicago Livestock Exchange. The petitioners alleged that the charge of $2 per car for delivery at the stock yards was unjust and unreasonable and was a discrimination against Chicago and in favor of other cities to which cattle was shipped from the same territory. The railroads answered that the terminal charge was just and reasonable, denied the discrimination, and asserted that the $2 per car was exacted because of the

trackage charge required by the stock yards company, and that previous to the imposition of this trackage charge the service of delivering cattle from the end of the carriers' rails to the Union Stock Yards was rendered gratuitously. The Commission held that the additional charge of $2 per car for delivery at the Union Stock Yards was unjust and unreasonable, under the circumstances, because compensation for this service was already included in the through rate, and that, assuming the correctness of the principle announced in the Keenan case, to wit, that the railroads were entitled to divide their rates and make one charge for transportation to Chicago and another charge for delivery at the Union Stock Yards, the railroads had not, in fact, divided their rates, and that their action in notifying the public of the extra charge and filing rate sheets containing it did not constitute a division of their rates but amounted merely to an addition thereto.

This *first report and order* of the Commission was made January 20, 1898 (7 I. C. C., 513). On application for a rehearing a *second report and order* of the Commission was made August 4, 1898. (7 I. C. C., 555a.)

The railroads declined to obey the order and suit was brought in the Circuit Court of Chicago to enforce it. The same defense was made before the court that had been made to the Commission. The case was decided in favor of the railroads December 4, 1899. The court held that the railroads had separated the terminal charge from the through rate, as they had the right to do under the *Keenan case;* that $2 was just and reasonable for the terminal service; and that no compensation for this service had previously been included in the through rate, but that such service had been performed for thirty years gratuitously. (*Interstate Commerce Com.* v. *C. B. & Q. R. R. Co. et al.*, 98 Fed., 173.) On June 15, 1900, the Circuit Court of Appeals affirmed this decision expressly on the authority of *Walker* v. *Keenan*, as decided by the Circuit Court of Appeals, denying to the Commission the

right to consider both the terminal charge and through rate together in determining the reasonableness of the terminal charge (*Interstate Commerce Commission* v. *C. B. & Q. R. R. Co. et al.*, 103 Fed., 249), Judge Grosscup, who had previously decided the same question against the contention of the railroads (64 Fed., 992), dissenting. The case was carried to the Supreme Court and there decided June 2, 1902 (*Interstat Commerce Commission* v. *C. B. & Q. R. R. Co. et al.*, 186 U. S., 320).

This court, in an opinion reviewing the controversy from its inception, overruled the court of appeals, wherein that court held that the Commission must treat the terminal charge by itself, and sustained the Commission in every contention on the merits, holding that the through rate had always included a charge for delivery at the Union Stock Yards; that the railroads had never divided their rates so as to separate the charge for the terminal service from the charge for the through service, but had merely added $2 to the through rate; that the Commission was right in determining the reasonableness of the terminal charge by considering the fact that compensation for the terminal service was already included in the through rate, whether segregated or aggregated, and that, under these circumstances, the terminal charge was unjust and unreasonable. This court, however, was obliged to affirm the court below, because it appeared in the report of the Commission, upon which its order was based, that the through rates on live stock to Chicago from some points embraced in the territory covered by the complaint, had been reduced in 1896, 5 cents per hundred pounds, or from $10 to $15 per car, and since the Commission had only found the $2 terminal charge to be unreasonable by considering it in connection with the through rate, it could not be unreasonable on shipments from these points from which the through rate had been reduced $10 to $15 per car; and since it did not appear in the

report of the Commission what those points were it followed that no part of the Commission's order could be enforced.

This court, however, in order to make its position clear, stated at the end of the opinion that its refusal to execute the order of the Commission should not be construed as preventing that body from commencing other proceedings to correct any unreasonableness in the charge on shipments from territory to which the reduction in the through rate did not apply.

The Cattle Raisers' Association and the Livestock Exchange (on Feb. 28, 1903) filed another petition with the Commission setting forth that rates from that territory to which the reductions of 1896 applied, had since been advanced, and were then higher than they were before June 1, 1894, and praying the Commission to reopen the case, define this territory, and order the carriers to discontinue the terminal charge from that and from all other territory. The railroads claimed the case could not be reopened and that the controversy was ended by the decision in the 186 U. S. The Commission, however, took the suggestion of the Supreme Court in the closing paragraph of its opinion and reopened the case to give both sides an opportunity to show what the territory was to which the reduction applied, and held if there turned out to be any territory from which there had been no reduction, the Commission would enforce an order against the $2 charge on shipments from that territory, unless the railroads could show that the through rate from that territory was reasonable and just, notwithstanding the addition of the $2 charge. This, the *third report* of the Commission, was made March 4, 1904. (*Cattle Raisers' Ass'n* v. *C., B. & Q. R. R. Co.*, 10 I. C. C., 83.)

The Commission, upon the reopening of the case, designated the territory covered by the reductions of 1896, and found that twenty-nine thirtieths of the shipments by the railroads had come from territory which was not included

in such reductions. The Commission then went into the whole question of through rates and their reasonableness, both when considered alone and in connection with the terminal charge. A great volume of evidence was submitted by the carriers and the complainants. The carriers claimed that the through rates were low enough to justify the additional charge at Chicago, and the complainants insisted that the through rates were high enough to include, and did include, compensation for this service. The Commission excluded the territory covered by the reductions of 1896 (although it found that as to that territory there had been three advances since the reductions, and the rates had become higher than they had ever been since they were first filed with the Commission in 1887). As to the territory not included in the reductions of 1896 the Commission found that the through rates were ample to cover the terminal charge, and ordered the railroads to cease any exaction for this purpose, over and above the $1 per car, which was the average charge by the Stock Yards Transit Company. This, the *fourth report and order* of the Commission, was made August 16, 1905 (*Cattle Raisers' Ass'n of Texas et al.* v. *C. B. & Q. R. R. Co. et al.*, 11 I. C. C., 277). No proceedings were begun for the enforcement of this order. In other proceedings to which all the railroads involved in this case were, among others, parties, the Commission had also examined the cattle rates from the west to Chicago, St. Louis, and Kansas City and had again found this terminal charge at Chicago to be unjust and unreasonable. (*Cattle Raisers' Ass'n of Texas* v. *Missouri, Kansas & Texas Ry. Co. et al.*, 11 I. C. C., 296, decided August 16, 1905.) Also in *The Matter of Class and Commodity Rates from St. Louis to Texas Common Points* (11 I. C. C., 238) the subject of live-stock rates and the effect of the advance in the cost of labor and supplies on all rates were fully considered and discussed, and the Commission

found, independent of the $2 terminal charge, that certain advances in through rates in the spring of 1903 were unjust and unreasonable.

Then came the amendment to the interstate commerce act, known as the "Hepburn Act," on June 29, 1906 (34 U. S. Stat., 584). Section 15 as amended authorized the Commission to fix maximum rates after a hearing. Before this amendment the Commission could only require the railroads in this case to cease charging $2 for the alleged terminal service at Chicago, and the railroads could have obeyed the order by reducing the charge to $1.99; since this amendment the Commission has power to establish a rate above which the railroads can not charge. Before this amendment the Commission was required to enforce its order in the courts; since the amendment the order of the Commission stands unless the railroads overthrow it in the courts. Before this amendment the function of the Commission in holding a rate to be unreasonable was judicial in character; since the amendment the action of the Commission in fixing a rate is legislative in character.

On December 3, 1906, after the passage of the Hepburn Act, the Cattle Raisers' Association and the Live Stock Exchange presented the new complaint which is the subject of the present suit. The railroads again objected, contending that the decision in 186 U. S. closed the matter, but the Commission held that this could not bar its right to examine the question anew in the light of present conditions and under the new powers granted by the amendment of June 29, 1906; that this was not a reopening of the case, and for that reason was not susceptible to the objection which the railroads had made before. Under stipulation of the parties all the testimony taken in the former proceedings was considered by the Commission, and a vast amount of additional testimony was introduced (Rec., 47). The Commission made this its *fifth and final order* October 21, 1907.

(Rec., 42; *Cattle Raisers' Ass'n* v. *C., B. & Q. R. R. Co. et al.*, 12 I. C. C., 507.) The order was reissued December 10, 1907. The Commission now again sets out the territory covered by the reductions of 1896 (Rec., 49), so that its order may be limited to shipments from territory not covered by such reductions if this court should so require. The Commission proceeds to find, however, that while these reductions were as a rule 5 cents per hundred pounds, rates from this same territory were generally advanced in February, 1899, 2½ cents per hundred pounds and in December of the same year 3 cents per hundred pounds, making a total advance of 5½ cents per hundred pounds, and leaving in effect a rate higher than that before the reductions of 1896. Further, the Commission finds that in the spring of 1903 these same rates were again advanced 3 cents per hundred pounds, and this is the rate now in effect. The order of the Commission then requires the railroads to cease charging more than $1 per car for delivery at the stock yards upon all shipments of live stock from points outside of Illinois. The present suit to enjoin this last order of the Commission was brought May 7, 1908, in the Circuit Court of the United States for the District of Minnesota. The decision of the court below was rendered June 30, 1908. (*Stickney et al.* v. *Interstate Commerce Commission*, 164 Fed., 638.) (Rec., 86.)

IV.

The present case is stronger for the Commission than that in which this terminal charge was condemned in 186 U. S.

The case which now comes to this court does not differ substantially from that which was decided in 186 U. S., except in so far as the position of the Commission has been strengthened. This court has expressly decided the $2 terminal charge at Chicago under the circumstances to be unjust and unreasonable, and the circumstances have not

changed except as they now disclose less justification for the charge. The facts now before the court are the same as those considered in the previous case, except that the action of the Commission is now supported by additional findings.

The only real differences between the case as made before and the present suit are as follows:

First. The present order of the Commission has been made in conformity with the new powers conferred by the act of June 29, 1906.

Second. While the Commission had not examined the through rates in the case before this court in 186 U. S., but had presumed them to be reasonable in the absence of evidence, and had held merely that the $2 additional charge was unreasonable, *the Commission has in this case taken hundreds of pages of testimony on the subject of the through rates* and heard arguments on both sides, expressly finding, as the result of this investigation, that the through rates on live stock to Chicago were, in 1894, have been ever since, and are now, sufficiently high to include, and do in fact include, the terminal service, except only as the cost of such terminal service has been increased at the average of $1 per car by the Stock Yards Transit Company.

Third. The Commission has found, in this case, that no advances or reductions on any of the through rates have had any relation whatever to the $2 terminal charge, but that this terminal charge has been simply imposed as an addition to the through rate. (Rec., 55–58 and 46–50.)

Fourth. With respect to the territory covered by the reductions of October, 1896, the Commission has found that the rates from such territory had increased from that date to December, 1899, until they had become higher than they were before the reductions; and further, that in the spring of 1903, after the decision in 186 U. S., these same rates were again advanced 3 cents per hundred pounds, and are *now higher than ever before.*

Fifth. The Commission expressly finds in this case that the railroads, parties hereto, *have not, in fact, separated* the terminal service and terminal charge from the through service and through rate. (Rec., 60, 63.)

Sixth. The Commission expressly finds in this case that the various points in Chicago to which, by their tariffs, the railroads, parties hereto, claim the through rates apply, *are not, in fact, the depots for the delivery of live stock* shipped to Chicago, but that the *Union Stock Yards is the depot for that purpose* of all said railroads; and that the depots claimed by the railroads are maintained solely in order to make such claim; and that some of said railroads do not even pretend to have any other depot than that at the Union Stock Yards. (Rec., 44, 61, 63.)

Seventh. The Commission finds in this case that the cost of transporting live stock from the end of appellees' rails and delivering at the Union Stock Yards, even including the $1 charge of the transit company, *is not more than half the average cost of delivering carload freight in the city of Chicago.* (Rec., 48, 62.)

Eighth. It does not appear in this case that the $1 terminal charge, which the Commission permits to stand, is unreasonably low for the service *which it alone purports to cover.*

Ninth. The Commission has found that the through rate to Chicago, plus the $1 per car, fully and amply compensates the railroads *for the whole service* of transporting live stock from the points of origin outside of Illinois and delivering the same to the Union Stock Yards.

Tenth. The railroads do not claim that the charge *for the whole service* rendered the shipper of live stock, after the reduction of $1 per car in Chicago, is now unremunerative or unjustly low.

It thus appears that the case now before this court presents even stronger reasons for upholding the action of the Interstate Commerce Commission than those which were

controlling on the merits of the controversy in 186 U. S. The court below, however, declares that the present case is to be distinguished from the one before decided by this court on the ground that the wording of the tariffs imposing the $2 terminal charge is different. In effect, the circuit court holds that the $2 charge in the present case is *more segregated* than it was in the previous case. As we shall point out later, the only difference between the two cases is that in the present case the tariffs of *all* the railroads involved declare that their live-stock depots are at certain points in and about Chicago, whereas in the former case only the tariff of the Atchison, Topeka & Santa Fe road contained such language. *In both cases the terminal charge was, and is, a mere addition to the through rate.* In neither case is there any bona fide attempt to "divide their rates and thus to make a distinct charge from the point of shipment to Chicago, and a separate terminal charge for delivery to the stock yards," as this court pointed out they might do in the previous case (186 U. S., p. 335).

It is further to be observed that, in the previous case before this court, the tariff of the Atchison, Topeka & Santa Fe road was worded in precisely the same way as appellees claim is the effect of all the tariffs in the present case, and it follows that the question as to whether or not such mere words in the tariffs constitute a division of the whole rate and a segregation of the terminal charge has already been passed upon. The exaction of the $2 for delivery at the Union Stock Yards was in the former case, and is in this case a mere addition to the through rate, which through rate then and now already embraced and included a charge for the same service.

ARGUMENT.

The controlling points in this case will be submitted in the following order:

First. The power of the Commission to make orders, such as the one here involved, is legislative in character, and an order so made can not be set aside by the courts unless it violates property rights guaranteed by the Constitution.

Second. The Commission did not commit an error of law in considering the terminal charge and through rate together, under the circumstances.

Third. The order of the Commission does not deprive the railroads of any property right even though $1 per car be less than the cost of the terminal service.

Fourth. It is not shown that the $1 terminal charge fixed by the Commission is less than the cost of the terminal service, or is unreasonably low.

Fifth. The order of the Commission applies only to the whole service of shipping livestock to Chicago and delivering at the Union Stock Yards, and there is no claim that the charge fixed for this service deprives the railroads of fair compensation.

FIRST.

As to the power of the Commission and the Courts.

The act of June 29, 1906, gives to the Interstate Commerce Commission the power to prescribe maximum rates after a full hearing upon complaint. Congress has conferred this power in conformity with the constitutional duty "to make all laws which shall be necessary and proper for carrying into execution" the clause respecting the regulation of interstate commerce. Congress has prescribed the general rule that all railroad rates shall be reasonable and not unduly discriminatory, and has imposed upon the Commission the duty of prescribing what particular rate in a given instance will conform to this standard. The act declares the rate

fixed by the Commission to be the maximum prescribed by law, and commands obedience to that law as if the rate itself had been designated in the statute.

The fixing of rates, whether by a legislative body or by a commission duly authorized, is a legislative act. *Maximum Rate case*, 167 U. S., 499; *Reagan* v. *Farmers Loan and Trust Co.*, 154 U. S., 362; (*Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 210; *The Home Telephone Co.* v. *Los Angeles*, 211 U. S., 265; *Honolulu Transit Co.* v. *Hawaii*, 211 U. S., 282.)

It follows that the courts can not suspend or set aside an order of the Interstate Commerce Commission prescribing a maximum rate unless it clearly appears—

> First. That the Commission has not proceeded in the manner required by the Interstate Commerce Act; or,
>
> Second. That the rate prescribed constitutes a confiscation of property.

In the case at bar the Commission proceeded regularly under section 15 of the interstate commerce act, as amended, and exercised its power to reduce this rate after a full hearing, upon complaint, as required by section 13. Therefore, the results reached by the Commission will not be disturbed by the courts unless it clearly and conclusively appears that by the order made the railroads are deprived of property without due process of law, or without just compensation.

Under the old law the function of the Interstate Commerce Commission was in its nature judicial. It passed upon the reasonableness of existing rates and the courts reviewed its conclusions just as they review those of an inferior judicial tribunal, treating the Commission as a referee of the circuit courts of the United States (37 Fed., 614); (*New Orleans & Texas Pacific Ry.* v. *The Interstate Commerce Commission*, 162 U. S., 184; *Maximum Rate*

case, 167 U. S., 479.) Under the Interstate Commerce Act as now amended the Commission fixes the rate and the courts have the same authority to review that they would if the rate had been fixed by Congress itself. The so-called "Court Review" amendment, which is embodied in the act of June 29, 1906, merely declares that to be the law which would be the law without such declaration. The only thing added is the venue of such cases and the express authorization of suits against the Commission as a representative of the Government.

It is not the reasonableness of the rate which is now before the court; that is a question which is submitted exclusively to the Interstate Commerce Commission. The rate fixed by the Commission may in the judgment of the court be unreasonable and yet it will not be declared unlawful unless it is so unreasonable as to constitute a confiscation of property. As this court said in the Knoxville Water case, *supra*—

> The courts in clear cases ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind.

And again in *San Diego Land & Town Co.* v. *National City*, 174 U. S., 739, 754—

> Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

It certainly can not be said in the case at bar that the order of the Commission presents a clear case of confiscation of property. However the Commission reached its conclusion; whatever facts or circumstances it considered; whether the process by which it arrived at the result was right or wrong—the court can not find in the order made a violation of the

constitutional rights of the carriers. Unless a confiscation of property clearly appears the order ought to stand.

SECOND.

The Commission did not commit an error of law in considering the terminal charge and the through rate together.

The court below in holding that the Commission had committed an error of law in considering the terminal charge and the through rate together, declared that the railroads had "published the terminal charge in question for service beyond their lines rendered necessary to complete the transportation undertaken by them;" that they had made this charge a "separate matter, as they had the undoubted right under the law to do," and that "neither the Commission nor the courts have the right to complicate it with any other service in determining the reasonableness of a charge fixed for it."

Here is the whole issue in a few words, and we submit that the court below is clearly in error.

The very question as to the right of "the Commission or the courts" to consider this terminal charge and the through rate together has been expressly determined in the affirmative by this court. In *C., B. & Q. R. R. Co. et al.* v. *Interstate Commerce Commission*, 186 U. S., 320, this court examined the same facts and held that the Commission was right in its former order when it reduced the terminal charge because the through rate already embraced compensation for the same service.

Coming to consider whether in the previous case there was a separation of the charge for carriage and the charge for terminal service and whether the rate for the latter service was just and reasonable, this court say, at page 336:

> Did the carriers, in June, 1894, when they imposed the alleged terminal charge of $2, separate in their

> schedules this charge from the through rate? That is, did they divide their charges by setting apart the terminal charge embraced in their previous through rate so as to segregate it from the through rate, thus making one distinct terminal charge and another distinct through rate? The mere inspection of the schedules demonstrates that such division was not made. This is the convincing result, since the schedules did not purport to draw out from the previous through rate the sum of compensation contained therein for terminal services. On the contrary, the entire previous through rate was retained, and a memorandum was placed upon the schedules to the effect that thereafter an additional charge of $2 for delivery at the stock yards would be exacted. This was a mere addition to the sum of the terminal charge embraced in the prior through rate. We think that it can not be said that to add an additional amount to a former charge was necessarily to divide such former charge, without holding that to add one sum to another is necessarily to divide the other.

There has been no change in facts or circumstances since the above statement was made by this court. The Commission in this case has expressly found that the carriers have never segregated the terminal service from the through service and that compensation for the former continues to be included in the rate for the latter. The court below holds that the railroads have separated these two services, but *the thing done* by the railroads is precisely the same as that which was shown in the case previously before this court.

The tariffs filed by the railroads, appearing in the record in this case, show that the $2 terminal charge is imposed in substantially the same way as it was in the tariffs formerly before this court. In every tariff the charge appears as a mere addition to the through rate. (Rec., 95–97.) The only possible difference is that some of the railroads which in the previous case did not even make a pretense of terminal

depots in Chicago, other than the Union Stock Yards, now set up such claim. But even in this respect the same facts were before the court in the former case because the tariff of the Atchison, Topeka & Santa Fe road made the same claim of a live stock depot in Chicago (other than the Union Stock Yards) that other appellees are now making for the first time. (Rec., p. 198, *C., B. & Q.* v. *Interstate Commerce Commission*, 186 U. S., 320.) In other words, the very question as to the effect of the pretended depots was involved in the former case and did not in any manner affect the decision. All these facts were before the Commission in the case at bar and the Commission found that the railroads had not in fact any depots for the delivery of live stock except the Union Stock Yards. The various affidavits filed by the railroads do not alter the facts in any degree whatever. These affidavits signed by some official of each railroad simply state that the "tariff provisions are construed" by the railroad "to mean" that the $2 charge was for a separate and distinct service segregated from the through service. (Rec., 33.) These affidavits do not show or claim that the compensation for this terminal service is not already embraced and continued in the through rate. The Commission found that "what the railroads had done in this case was not to separate the rates upon this live stock, but to make an arbitrary addition to the previous rate" (Rec., 45); and that "the sole result of the imposition of the terminal charge was to increase the cost to the shipper of $2 per car while the service remained identically the same." (Rec., 44.) That cost and service remain the same to-day.

Nor do the paper depots change the facts. Upon this subject the Commission found that some of the railroads about June, 1894, "provided in a very limited way such facilities at various points in and around Chicago, but in no cases were these facilities adequate to the handling of any

considerable number of animals. The railroads perfectly understood that shippers could not avail themselves of these facilities and the only purpose of providing them was to give color to the claim that they had in the vicinity of Chicago some live-stock depots other than the Union Stock Yards. Several of the defendants did not even make this pretense" (Rec., 44).

But it is claimed that the amendment to section 6 of the interstate commerce act, passed since the previous case was before this court, has altered the situation, and that now the carriers are *required by law to add a separate charge for terminal service* in all transportation of freight, and that the Commission is *required by law* to pass upon the reasonableness of this specific charge independently of all other charges. This contention may be dismissed in a few words. On the subject of terminal charges the only difference between section 6 of the interstate commerce act before and after the amendment of June 29, 1906, is that under the old law the railroads are required to "state separately *the* terminal charges," while under the new law they are required to "state separately *all* terminal charges." There may be a distinction, but certainly there is not a difference between the obligation of stating *the* terminal charges which railroads impose and that of stating *all* terminal charges. *In neither case is there an obligation to make any terminal charge.* All the law meant and means is that in any case in which a carrier exacts a terminal charge that charge must be separately stated.

In the case at bar, just as in the case involving the same controversy in 186 U. S., the railroads attempt to make this $2 charge a separate item for a separate service, but the fact is that it is merely an addition to the through rate. It is not in fact a terminal charge or a terminal service. The transportation of live stock to the Union Stock Yards is as much

a part of the carrier's duty as the transportation over any other portion of the journey from the point of shipment to the market. The same cars, the same engines, and the same crews operate over the tracks of the Transit Company from the end of the carriers' rails in Chicago to the Union Stock Yards that are used over any other part of the journey from the point of shipment to the market. The tracks in Chicago that lead to the Union Stock Yards are a part of the "railroad" operated by the carriers as defined by section 1 of the Interstate Commerce Act. They are a part of their roads under section 6 of the Interstate Commerce Act, as amended June 29, 1906, because while formerly the carrier was required to state in its schedules "the places *upon its railroad* between which property and passengers would be carried," it is now required to state "the places between which property and passengers will be carried" and these places mean any points, either upon the carrier's own rails or upon the rails of another, over which it has authority to operate its trains.

If we look to further changes in the act which affect the question of separate charges we find that by the first section the new duty is imposed on the carriers to "establish through routes and just and reasonable rates applicable thereto." This has reference to "transportation" as defined in that section. It then declares that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid *or in connection therewith* shall be just and reasonable." The obligation to make the rates from point of origin to destination is complete and the right to make just and reasonable charges in connection therewith is complete, but the Commission has full power to determine what is "just and reasonable" under the circumstances in either case.

The railroads have created the Union Stock Yards. They have made it their depot. They have made it the only avail-

able place for delivering live-stock in Chicago. They have made it the greatest live stock market in America. They have used it as such for thirty years. They can not now by pretending to create a terminal service and by pretending to construct other live-stock depots charge an extra fee or an additional rate for delivering at the Union Stock Yards (*Covington Stock Yards* v. *Keith*, 139 U. S., 128). Certainly they can not make any charge above the $1 imposed upon them by the transit company. The requirement of the interstate commerce act that the railroads shall separately state the, or all, terminal charges means of course such terminal charges as are in addition to the through rate, and does not mean such terminal charges as are included in the through rate, or such as are imposed for a service which is a necessary part of the through service.

Aside from the legal right of the Commission as thus shown to consider the through rate in determining the reasonableness of the so-called terminal charge, there are practical reasons which must commend themselves to this court. Counsel for the railroads say that the Commission ought to reduce the through rate to Chicago and leave the terminal charge alone. But these through rates to Chicago are made from a vast number of points by a great number of railroads. To deal with these rates exclusively it would be necessary to cite before the Commission all the railroads and make orders reducing all the joint rates. It is not conceivable that Congress intended the Commission to proceed in any such way if in its judgment complete justice could be secured by simply reducing the terminal charge. The through rate is expressed in a certain amount per hundred pounds; the terminal charge is expressed in a certain amount per car. The contents of cars varies from 14,000 to 30,000 pounds. Now, if the Commission must let the terminal charge stand and take out its equivalent from the through rate, how is the amount per car to be translated into, or

expressed in, an amount per hundred pounds? Even if it were possible of exact expression the result to the shippers would be the same as if the Commission had simply reduced the terminal charge. Why require the Commission to reduce the through rate when the railroads have improperly added the terminal charge which was already included in the through rate? Why not permit the Commission to undo the very thing that the railroads have improperly done? Why not permit the Commission to correct the error by eliminating it? Who can possibly be injured by doing this if on the whole it is right?

The effect of the carriers' contention is that the manner of doing the wrong justifies it.

If the Commission is to deal effectively with these transportation problems its power must be as broad as that of the traffic manager. Whatever rate the carrier can impose the Commission must have power to remove or modify; otherwise its remedies will never reach the wrong. If the railroads in this case had, instead of imposing the terminal charge, raised the through rate by an amount equal to the same revenue, the Commission might then of course have dealt with the through rate. If on the other hand, the railroads, in imposing this terminal charge, had reduced the through rate by an amount equal to the terminal charge there would have been no complaint. But the railroads under the guise of creating a special terminal service have simply added $2 per car to the through rate, and we submit that the Commission did the only just and practicable thing when it reduced the terminal charge after finding that it was already included in the through rate which was high enough to compensate the railroads for the full service.

There is another reason which justifies the Commission in reducing the terminal charge rather than the through rate. As stated by the Commission (Rec., 50), live stock from very

much of the territory involved in this case can be marketed at many different points like Chicago, St. Louis, Kansas City, and Omaha, and the rate is an important factor in determining to which of these markets the shipper will send his stock. The rates to these different markets bore a certain appropriate relation to each other. When the $2 terminal charge was put on at Chicago and no like charge was put on at St. Louis, Kansas City, or Omaha, there was an unjust and undue discrimination against the Chicago market, and the only way in which this discrimination, forbidden by the interstate commerce act, could be dealt with by the Commission was by reducing the terminal charge. The bill and the decision of the circuit court completely ignores this feature of the Commission's findings. It is an integral part of the report and opinion on which the order is based and is in nowise negatived in the bill nor in the proofs offered. In this the bill is fatally defective.

We submit, therefore, that the Commission was not only right in law but that its duty, under all the circumstances, was to consider the terminal charge and the through rate together, and having found that the through rate was already high enough to, and did, include the service of delivering live stock at the Union Stock Yards to reduce the terminal charge.

THIRD.

The Commission's order does not violate constitutional rights even if $1 is less than the cost of terminal service.

The court below based its decision on the ground that the $1 charge, fixed as a maximum by the Commission, is confiscatory, or is, at least, beyond the power of the Commission to establish because it is admitted that the entire service of transporting live stock from the end of the railroad companies' tracks to the Union Stock Yards, of delivering the

stock there, and returning the empty cars is more than $1, and is, indeed, more than $2, which the roads themselves charge for this service.

The rule adopted by the court below is that where railroad companies publish a terminal charge for terminal service, and the Interstate Commerce Commission is called upon to declare whether or not the same is reasonable, the Commission must, as a matter of law, determine this question solely by the cost of the terminal service, independent of the fact that the through rate already includes compensation for the terminal service and independent of the fact that the transaction as a whole is profitable to the roads.

We submit that such a rule is not sustained by reason or authority. To uphold it is to say that the railroads can charge twice for the same service, and the Commission is without power to strike off the charge which is last put on. We submit that even if the railroads had in this case, actually and in good faith, separated the terminal service from the through service, and the terminal charge from the through charge, the Commission could reduce the terminal charge if they found that the through charge was high enough to include it.

But the railroads have not separated these two services and charges. They *can not separate the services* because a shipment of live stock from the point of origin to the Union Stock Yards is one transaction and inseparable. They *have not separated the charges* because the through rate still includes compensation for the terminal service, and the terminal charge is simply an addition to the through rate. They have never attempted to "draw out from the previous through rate the sum of compensation contained therein for terminal services," as this court said in the former case (186 U. S., p. 336). All the affidavits, tariff sheets, and arguments submitted by the railroads can not change a fiction into a fact.

It is clear, therefore, that if a carrier adds a charge for a pretended separate service, which is already included in another service for which he is amply paid, the Commission may reduce the extra charge, *even to a point below the cost of the pretended separate service.*

There is nothing in the recent case of *Southern Railroad Co.* v. *The St. Louis Hay & Grain Co.* (214 U. S., 297) which is contrary to this view. In that case this court held that a carrier stopping goods in transit for inspection and unloading for the benefit of a shipper is entitled to compensation in addition to the actual expense incurred. There was no contention in that case that the service performed was a part of the transportation of the goods from the origin of the shipment to destination. Nor did it appear that the carrier, as in the case at bar, had already been paid for the specific service.

The railroads in this case admit that this terminal service has long been, and now is, paid for by the through rate. They admit this when they say that $2 is below the cost of the terminal service. If the through rate formerly included the terminal charge, as this court expressly found in 186 U. S., and if the $2 now imposed is still insufficient to pay the cost of the terminal service, the railroads must either be performing a service gratuitously (an assumption which can not be indulged) or compensation for it must still be in the through rate. To put the matter in another way: The charge for this terminal service has been found by this court to be included in the through rate, and the railroads are now contending that it is not there, although they have never taken it out.

That the cost of a particular service is not a proper test of the reasonableness of the charge for it when the service performed is part of a larger transaction is abundantly

supported. As this court said in *Minneapolis & St. Paul R. R.* v. *Minn.* (186 U. S., 257, 267):

> We do not think it is beyond the power of the state commission to reduce the freight upon a particular item, provided the companies are able to earn a fair profit upon their entire business.

In *St. Louis & S. F. R. R. Co.* v. *Gill* (156 U. S., 649) this court held that passenger rates over a single part of a railroad could not be held to be confiscatory without considering the whole rate and the effect of the rates upon the profitableness of the whole road.

To the same effect see *Atlantic Coast Line R. R. Co.* v. *N. C. Corp. Com.* (260 U. S., 1); *Cov. & Lex. Turnpike Co.* v. *Sanford* (164 U. S., 596); *A. & V. R. R. Co.* v. *Railroad Com. of Miss.* (203 U. S., 496); *Railroad Co.* v. *Well & Neville* (96 Tex., 408).

In the Atlantic Coast line case, *supra*, this court points out the difference between the consideration of a particular charge and a whole schedule of rates, saying at page 24:

> "In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself, demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety."

It follows that, in the present case, even if $1 per car be below the cost of the particular service, the railroads can not complain, since the whole charge for the whole service is admittedly profitable.

FOURTH.

It is not shown that the one dollar terminal charge, fixed by the Commission, is less than the cost of the terminal service.

The railroads in this case contend that the order of the Commission requires them to perform this so-called terminal service below cost. They say that the Commission has heretofore found that the charge of $2 per car is less than the actual expense to the carriers in rendering the service.

The answer to this is that neither the railroads, in their proofs offered below, nor the Commission, in its report, undertake to show what the extra cost is to the appellees of delivering live stock at the Union Stock Yards instead of at their pretended depots in Chicago. The only evidence on that subject is the trackage charge of the transit company, averaging $1 a car, and this is allowed by the Commission. There is no evidence of any other extra expense whatever.

It is true that the entire cost of transporting the cars, delivering the stock at the Union Stock Yards, paying terminal agency expenses, and returning empty cars, including the average $1 trackage charge, may be $2 or more per car, but how much of this expense would be necessary for deliveries at other terminals in Chicago does not appear. Therefore there is no basis for the claim that $1 per car is less than the extra expense incurred by the railroads in delivering at the Union Stock Yards instead of elsewhere. As this extra expense is the chief excuse made by the railroads for imposing the extra charge they can not complain if the order of the Commission reduces the extra charge to the only extra expense which is shown. With respect to all other freight in Chicago, the average cost per carload for delivery is more than twice that of live stock. (Rec., 48, 62.)

This claim of the railroads that the Commission's order requires them to perform the alleged terminal service for less than cost, and that the cost of such service is more than $2, requires them to contend for too much. The railroads themselves make the $2 charge, and if this is below the cost it only evidences the fact that the railroads look to the through rate for compensation for the terminal service. They can not be presumed to perform any service gratuitously. (*Interstate Com. Com.* v. *C., B. & Q. R. R. Co.*, 186 U. S., 320; *Pierce* v. *Milwaukee R. R.*, 23 Wis., 38.) They can not convince by the assertion that they are either willingly or unwillingly performing a service for less than cost *so long as they retain full pay for it in another pocket.*

FIFTH.

Commission's order applies only to whole transaction of shipping live stock from points of origin to Union Stock Yards, and there is no claim that charge fixed for this service deprives railroads of fair compensation.

Even if it be true that $2 per car is below the cost of the terminal service, considered as a distinct and separate transaction, it will be seen from the language of the Commission's order that the railroads are not required to perform the terminal service as a distinct and separate transaction. The order of the Commission requires that the railroads shall put in force, on or before the 1st day of February, 1908, a terminal charge which shall not exceed $1 per car, if any terminal charge is made, for delivery at the Union Stock Yards. This service is never performed or required except where the through rate is also paid. There is no such thing as a shipment of live stock beginning at the end of the appellees' rails in Chicago and ending at the Union Stock Yards. The Commission's order merely requires that no more than $1 per car shall be charged by the railroads for delivery at the Union Stock Yards

"with respect to shipments of livestock transported by them from points outside the state of Illinois."

In other words, the railroads are not required to do anything for the $1 alone. They are only required to haul live stock from points outside of Illinois to the Union Stock Yards, Chicago, at the same rates they have heretofore received, plus $1, made necessary by the trackage charge of the transit company.

The railroads do not, anywhere in the record in this case, contend that this sum for the entire service is below the cost of such service, or fails to yield a fair and full compensation.

CONCLUSION.

Every intendment of law and fact should avail to support the Commission's order.

In submitting this case we respectfully suggest that every consideration affecting either the public or the railroads should incline the court to uphold the order of the Commission. This controversy has been prolonged. The Commission has made repeated investigations of the subject, has invariably reached the same conclusion, and has found but one effective remedy.

For fifteen years the railroads carrying live stock from the West into Chicago have persisted in adding this unjust and discriminatory sum to the through rate. They have made this increase under the guise of a special charge for a terminal service, using the fact that the company over whose rails they deliver live stock to the Union Stock Yards imposed a trackage charge of $1 per car as an event to justify an increase to the shippers of $2 per car.

When all is said and done, the only purpose of this terminal charge, over and above $1 per car is to increase the revenues of the railroads for performing the same service which they had before performed without such charge.

This case turns almost wholly upon questions of fact, and the Commission's findings are and ought to be conclusive. The Commission has found as matters of fact:

1. That the railroads have never separated the so-called terminal service and terminal charge from the through service and through rate.

2. That the through rate now embraces compensation for the so-called terminal service.

3. That the through rates as to all territory from which cattle are shipped to Chicago are high enough to fully compensate the railroads for the whole service of transportation from the point of origin to delivery at the Union Stock Yards in Chicago.

4. That the tracks of the Union Stock Yards Transit Company are a part of the carriers' "railroad" as that term is used in the Interstate Commerce Act.

5. That the Union Stock Yards is the depot of the carriers for the delivery of live stock in Chicago.

6. That there has been no change in circumstances or conditions since the decision of this court in 186 U. S.

7. That no showing has been made that any loss will result from obedience to this order or that the business affected by it will not be profitable.

These facts being conclusively established, there can be no question as to the law applied to them. The order made by the Commission was the only order it could lawfully make.

When questions of fact are submitted to executive or administrative officers of the Government their conclusions are final. When questions so submitted involve both fact and law the conclusion will not ordinarily be disturbed by the courts. Even when a question of law only is submitted to other departments the courts will make every presumption in favor of the interpretation reached.

As stated by this court in *Bates & Guild Co.* v. *Payne*, 194 U. S., 106:

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not, ordinarily, review it, although they may have the power and will occasionally exercise the right of so doing.

Again, in *Marquez* v. *Frisbie* (101 U. S., 473) the court used, upon the same subject, this language:

> This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court can not so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

We submit that the order of the Commission was right and that the bill of complaint of the appellees herein should be dismissed.

Respectfully submitted.

WADE H. ELLIS,
Assistant to the Attorney-General.
S. H. COWAN,
Special Attorney.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 251.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,
against
ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH,
RECEIVERS OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

ADDITIONAL BRIEF FOR APPELLEES.

Statement.

This is an appeal from an interlocutory decree suspending the enforcement of an order of the Interstate Commerce Commission (hereinafter referred to as the "Commission"), prescribing a maximum charge of $1 per car, in lieu of the charge established by the appellees of $2 per car, for the transportation by the appellees of live stock from their respective tracks in Chicago to the Union Stock Yards in Chicago.

Since 1904 the live stock schedules to which appellees are parties have shown explicitly that the rates to Chicago cover transportation only to points on the tracks of the appellees, and that a terminal charge of $2 per car is imposed for the transportation from any such point to the Union Stock Yards.

For example, the schedule of the Chicago, Milwaukee & St. Paul Railway shows rates on live stock in car loads between "Chicago, Ill. (Galewood Stock Yards)," and other stations, and contains the following provision:

> "NOTE.—This Company's railway does not reach the Chicago Union Stock Yards, and the rates given herein cover the transportation charges between the stations named and Galewood, Ill., Stock Yards only.
>
> "$2 per car in addition will be charged on live stock car loads when consigned to or from the Chicago Union Stock Yards. This terminal charge must be entered separately by waybilling agent in 'freight charge' column of way bill; also inserted on bill of lading and live stock contract" (Record, page 96).

Provisions to the same effect are in the schedules of all the other appellees (Record, pp. 95 to 98), and have been since 1904 (Record, pp. 20 to 33).

Undertaking to act under section 15 of the Act to Regulate Commerce (as amended by the so-called Hepburn Act of June 29th, 1906), the Commission after hearing upon a complaint ordered the appellee to cease and desist from exacting the terminal charge of $2 per car, and to put in force and apply during a period of not less than two years a charge not exceeding $1 per car (Record, p. 8).

The Commission, in its opinion, stated that the terminal charge of $2 per car had been the subject of complaint and litigation since 1896, and referred to its former decisions on

that subject, and to the decision of this court thereon in Interstate Commerce Commission *vs.* Chicago, &c., Railroad Company, 186 U. S., 320. The Commission's reasoning was the same as in its earlier opinions, and it stated: "The issues are the same as heretofore" (Record, page 47), and "we see no reason to change our former holding in this matter" (Record, page 48).

A portion of the Commission's former holding was

> "that looking entirely to the cost of service and including as a part of that cost the trackage charge paid the Union Stock Yards & Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge, is reasonable" (Cattle Raisers' Association against Fort Worth & D. C. R. Co., 11 I. C. C. Rep., 555*c*).

The Commission's theory in this case is that the charge of $2, while reasonable *per se*, is, to the extend of $1, included in the rate to Chicago and is justifiable only as to the remaining dollar, which represents the trackage charge imposed upon appellees since June 1st, 1894, by the Stock Yards Company. The Commission's precise holding was

> "that live stock rates from points in other States and Territories to Chicago over the lines of the defendants are sufficiently high to include a delivery at the Union Stock Yards save for the trackage charge exacted by the Stock Yards Company, and that the imposition of the $2 terminal charge for such delivery is unjust and unreasonable" (Record, page 48).

Commissioners Clark and Harlan dissented from the conclusions of the Commission (Record, page 50).

To restrain the enforcement of the Commission's order, the appellees filed this suit against the Commission, and upon the bill, answer and affidavits filed on behalf of complainants the temporary injunction was granted.

ARGUMENT

I.

Each appellee had the right to divide the charge for transportation so as to have one rate from point of shipment to a point on its tracks in Chicago, and a separate charge thence to the Stock Yards.

This right was declared by the Circuit Court of Appeals (Walker *vs.* Keenan, 73 Fed., 755), is admitted by the Commission (7 I. C. C. Rep., 548), is clearly recognized by section 6 of the Act to Regulate Commerce, and is expressly announced in Interstate Commerce Commission against Chicago, etc., R. R. Co., 186 U. S., 320, 335.

Commission's Counsel emphasizes that none of the appellees has on its tracks sufficient stock yards to accommodate the live stock shipped via its line. This fact, if relevant at all, bears only on the question of the right to segregate, and is manifestly irrelevant on that question. This Court has held in the case last cited that where the shipment is destined to a particular terminal which is beyond the carrier's line the carrier has the right to have one rate for the transportation over its own tracks, and a separate charge which shall be the exclusive compensation for the terminal charge beyond its tracks. If the carrier makes such segregation it is sufficient for the carrier to provide on its own tracks such facilities as may be necessary to accommodate shippers who elect not to avail of the terminal service. There is no suggestion that the facilities afforded on the tracks of each appellee are not sufficient for

this purpose. Even their insufficiency would not defeat the right to segregate, but would be a defect to be remedied at the instance of any shipper aggrieved. If all shipments invariably went to the terminal beyond the carrier's tracks, so that no unloading facilities whatever were needed or provided on the carrier's tracks at all, the right to segregate would still exist to the fullest extent.

Commission's counsel claims that "the same cars, the same engines and the same crews conduct the operations between appellees' tracks and the Stock Yards as conduct the operations over any other part of the journey from the point of shipment." This is not shown by the record, and the statement as to engines and crews is contrary to the universal practice of conducting switching service with entirely distinct organization and engines. Commission's counsel also claims that the terminal service is never performed except in connection with the transportation to Chicago. These comments could bear only upon the right to segregate; but notwithstanding such considerations this court has held that the carrier has that right.

II.

The appellees did in fact divide their rates so that $2 was the sole charge for the transportation from appellees' tracks to the Stock Yards.

The schedules of appellees are explicit on this point. The so-called Chicago rate applies, and since 1904 has applied, only to designated points on the tracks of appellees and covers no service beyond those points. The terminal charge of $2 is the sole charge for the service between the

tracks of the appellees and the Union Stock Yards. There is no ambiguity in the language of the schedules. If there were any such ambiguity it would be disposed of by the uncontradicted affidavits of the traffic and accounting officers of appellees (Record, pages 20 to 33), to the effect that the uniform practical construction of the tariffs has been that they have accomplished such segregation.

The question whether there has been such segregation is the vital question in this case. Commission's counsel say that there has not been, because "there has been no change in facts or circumstances since" the decision by this court in case last cited and because this court held in that case that there had not been such segregation at that time.

The situation before this Court in the former case was as follows:

For thirty years the carriers had in effect live stock rates "to Chicago," which included delivery at the Stock Yards (186 U. S., 336). By circulars effective June 1st, 1894, the carriers merely imposed an additional charge of $2.00 for delivery at the stock yards. But the carriers did not modify or further define the expression "to Chicago," and the live-stock rates continued to be rates "to Chicago," and therefore naturally continued to convey the idea that they included delivery at the Stock Yards.

The Commission's counsel seized on this substantial defect. On page 11 of their brief in this Court (in the former case), they characterized as a "figment of the imagination" the carriers' claim that they had limited the Chicago rate to their own lines, and counsel insisted that there had been no modification of the Chicago rate. On page 3 of their reply brief Commission's counsel pointed out that

section 6 of the Act required schedules to state the places between which property would be carried, and that the schedules of the Railway Companies made no "change in the destination reached by the through rate."

This Court pointed out (186 U. S., 337) that the Act to Regulate Commerce requires that the schedules shall plainly state the places between which property will be carried: that the purpose of this provision was to compel the schedules to be so drawn as to plainly inform of their import, and that when rates were changed the change should be so stated as not to mislead and confuse, "all of which would be frustrated if the schedules relied upon were given the effect which the defendants now claim for them."

Such considerations cannot apply to the schedules in force since 1904, which do modify the former Chicago rate by explicitly limiting it to a destination on the appellees' own tracks, thus plainly stating as the place to which the property will be carried for that rate a place different from the place which thirty years of practical construction had given to the mere word "Chicago." Surely the Commission and its counsel are mistaken in assuming that "there has been no change in the facts or circumstances" since the former decision by this court.

The only argument adduced by Commission's counsel to offset this radical change in the facts and circumstances is that in the former case the record showed that the Atchison, Topeka and Santa Fe, one of the nine carriers involved, did in 1896 specify the place on its own tracks to which the Chicago rate applied. But the Court's opinion was confined to the effect of the circulars of 1894, and an examination of the briefs shows that the Atchison Company's exceptional

provision in 1896 was not pressed upon the court. On the contrary, the Atchison Company elected to rely solely upon the circulars of 1894, which did not limit the Chicago rate to the carriers' own lines. This is evident from the brief filed on behalf of all the Railway Companies. The phraseology of the schedules as bearing upon the question of segregation is referred to on pages 5 and 30 of their brief, and at neither place is there any statement of the exceptional character of the Atchison Company's schedule of 1896. On the contrary, on page 30, the Atchison Company's circular of 1894 was quoted, and it was stated that all the other schedules were to the same general effect.

In that case this Court in showing there had been no separation of the terminal charge pointed out also (186 U. S. 336), that "the schedules did not purport to draw out from the previous through rate the sum of compensation contained therein for terminal services." The Court, however, did not hold that such a reduction in the rate to Chicago would be necessary to a segregation if the schedules expressly limited the Chicago rate to a destination on the tracks of the Railway Companies, and such a holding would have been in conflict with the clear rights of the carrier. The carrier had both the right to increase its Chicago rate and the right to restrict that rate to a destination on its own tracks. A restriction of the rate to a destination on the carrier's own tracks without any reduction of the rate was just as clearly within the carrier's rights as an increase in the Chicago rate would have been.

Commission's counsel lay stress upon the fact that the schedules provide that the terminal charge is *in addition to* the rates to the points on appellees' tracks, and seem to

assume that the use of the expression "in addition to" prevents what would be but for that expression a segregation of the terminal charge. The use of such expression is entirely consistent with the idea of segregation. Necessarily the terminal service is in addition to the service of transportation to points on the appellees' tracks, and necessarily the charge for the former is in addition to the charge for the latter. This fact would exist no matter how the idea of segregation should be expressed, and there can be no objection to recognizing the fact.

The only way to give legal effect to schedules published in accordance with the Act, and to avoid the confusion which would result from ignoring their proper effect, is to deal with the rates according to the service which those rates undertake to cover. The carriers and shippers are bound by the lawfully published schedules, and the Commission too must respect the legal effect of those schedules until changed in accordance with law. Otherwise the Commission sets at naught one of the law's fundamental objects, which was to secure certainty and accuracy in defining both the rate and the service.

This case presents the following curious situation: The Commission has investigated and reduced the terminal charge and has also investigated and reduced the Chicago rate (as to the Chicago rate see Cattle Raisers' Association of Texas *vs.* M. K. & T. Ry. Co., 13 I. C. C. Rep., 413; M. K. & T. *vs.* Interstate Commerce Commission, 161 Fed., 645). But the Commission refuses to give the legal effect to the schedules as published, and insists that the cost of delivery at the Union Stock Yards (other than the amount of the trackage charge) shall not be included in the terminal

charge, but must be included in the rate to Chicago, although this Court has held that the carriers have the right to include the entire cost of delivery in the terminal charge, and although the carriers have done so by an explicit declaration in their schedules.

If the court sustains the Commission's contention that notwithstanding the schedules now in force all of the terminal service (other than the amount paid for trackage) between the appellees' tracks and the Union Stock Yards continues to be included in the rate to destination on the appellees' tracks, the result is to deny to the appellees the right to make the segregation which in the former case the court distinctly upheld. It is impossible to make a segregation more clear than that now in force. The schedules expressly limit the Chicago rate to points on the tracks of the appellees and provide a separate charge for the separate service beyond those points. Either this is a segregation or the carriers have no right to make a segregation.

III.

If complete segregation has been lawfully made, appellees are entitled to have the terminal charge considered accordingly.

If a complete segregation has been lawfully made, the effect of that segregation is that the rate for the transportation from point of shipment to the point upon appellee's tracks is the compensation for that service, and the terminal charge is the compensation for the service thence to the stock yards. Unless this effect be given to the schedules the

right to segregate is in fact denied, although in theory conceded.

The Commission's counsel insist that the Commission has the right to take into consideration the profitableness of the rate to Chicago; that the Commission has extensively considered that subject; that it is more convenient to reduce the terminal charge than it is to reduce the through rate; that the reduced terminal charge is applied only when the service is performed in connection with the transportation to Chicago. All these facts were equally true of the order considered by this Court in the former case, and yet in that case this Court assumed that it could justify the Commission's determination of the question upon such considerations only if there was no complete segregation of the charge for the terminal service, and, therefore, the Court elaborately considered the question whether there had been such segregation. Such consideration would have been useless if the Commission's course would have been justified notwithstanding such complete segregation.

It is unnecessary in this case to consider how far in a proper case the Commission in prescribing the reasonable rate for a given service could look to the compensation received from other related services. In this case the Commission has refused absolutely to consider as a part of the terminal service factors which are essential elements of that service. In doing this the Commission has denied the right of segregation which this Court has upheld.

IV.

The Commission's order is contrary to the Constitution and to the statute.

(a) The Commission's order violates the Fifth Amendment of the Constitution.

The bill avers that the $2 terminal charge is less than the actual necessary expense of performing the terminal service, and that the $1 terminal charge prescribed by the Commission is less than one-half the actual necessary expense of performing the terminal service (Record, page 9). These averments are not denied by the answer.

The Commission's opinion upon the first complaint as to the original terminal charge stated that the Railway Companies showed that the average cost of performing the terminal service was $2.22 per car. The Commission analyzed to some extent the estimates of the Railway Companies, but did not dissent from, or modify, those estimates (7 I. C. C. Rep., 513, 526). The Commission in its opinion in this case refers to its former opinion and says "the issues are the same as heretofore," and "we see no reason to change our former holding" (Record, pages 47, 48).

Thus the Commission's order requires the carriers to perform a service for less than the cost of the service, and thus requires the carriers to devote their property and resources to a specific service without just compensation, and to that extent deprives the carriers of the rightful use of their property, and hence of the property itself, without due process of law.

The Act to Regulate Commerce deals with rates in detail. It prescribes that each rate for each service shall be just and reasonable, and in effect prohibits separately each undue preference. The act does not contemplate or authorize a general revision of all the rates of any one carrier, but contemplates that there shall be complaints only as to specific rates, and that the hearing by the Commission and the proceeding in court shall be directed to the specific rates complained of. The constitutionality of the Commission's act may be and must be determined by the specific thing the Commission does.

In Southern Railway Company *vs.* St. Louis Hay and Grain Company, 214 U. S., 297, 301, this Court has held that where a service is performed which is beneficial to the shipper and involves expense to the Railway Company, the latter is not limited to the actual cost of that service, but is justified in receiving some compensation in addition thereto.

In the present case the Commission not only denies all profit but also fixes the maximum rate much below the actual cost.

(b) There is no authority for the claim that, in order to set aside a rate prescribed by the Commission, the carrier must make a showing of confiscation as to all its business.

The Commission claims that its order prescribing a maximum rate cannot be set aside as unlawful unless the carrier can show that it is unable to earn a fair return upon its entire property from all its business of every character. This contention means that the revenues of the carriers are subject alone to the absolute and final control of the Commission down to the point where the net revenue becomes

less than a fair return upon the value of the property as a whole: that the commission dealing with one rate at a time may make reductions to a point far below the actual cost of the service, and yet may be unmolested in this course, provided the carriers have a fair profit left on their business as a whole.

This contention also means that the Commission's power over questions of undue preference between individuals, localities or descriptions of traffic is absolute and final, for the Commission can make the most far reaching readjustments of rate as between different persons, localities or descriptions of traffic, raising the rates in one instance and reducing them in the other, without reducing the total return of the carriers below a fair return on the property as a whole.

The cases relied upon to sustain this contention are not in point and will be briefly discussed.

Minneapolis and St. Louis Railroad Company vs. Minnesota, 186 U. S., 257.

The question was as to the reasonableness of a rate on hard coal in car load lots. The Railroad Company did not claim or show that the rates atacked would be unprofitable. Upon this point the Court said:

The rate complained of "was not met by any showing that at the rates fixed by the Commission there would be no profit or an insufficient profit upon the coal so transported" (page 265).

"The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in car load lots" (page 266).

From these references of the Court to the fact that the Railroad Company had not proved that the rate complained of was unprofitable it is manifest that such showing would have been relevant to the inquiry as to the constitutionality of the Commission's order.

What the Railroad Company did prove was that if all freight had been carried at the same rates as were fixed by the Commission for coal in car load lots, then the road would not pay operating expenses (page 266). It was in commenting upon this unsound theory that the Court stated that it might well be that existing rates not disturbed were sufficient to earn a large profit, and that companies were not entitled to earn the same percentage of profit upon all classes of freight.

Atlantic Coast Line vs. North Carolina Corporation Commission, 206 U. S., 1.

The Court pointed out (page 26) that the case did not involve the fixing of rates at all, but involved an order requiring a train service which it was the carrier's duty to furnish for the public convenience, and that as a carrier could be compelled to furnish adequate facilities, although pecuniary loss might result, there was a clear distinction between such an order and an order fixing rates.

The Court did not suggest even as a dictum that a rate could be constitutionally prescribed for the carrier which would be less than cost. On the contrary, the Court conceded for the purposes of that case (page 26) that such an order would be unconstitutional.

The cases holding unconstitutional a general scheme of rates because not yielding a fair return upon the carrier's

property were referred to by the Court simply because those cases had been relied upon by the Railway Company's counsel. The Court confined itself to stating what those cases involved and that they did not apply to a case involving an exercise of State authority to compel a carrier to perform a specified duty.

St. Louis, San Francisco Railway vs. Gill, 156 U. S., 649.

It appeared that the legislature of Arkansas prescribed a three-cent passenger fare. The St. Louis & San Francisco Railway undertook to prove that that rate was confiscatory as to a single division of its line extending from the Missouri State line to Fayetteville, a distance of thirty (30) miles. The company made no showing as to the rest of its line in the State. The court did not refuse to consider the confiscatory character of the rate prescribed, but merely refused to let the railway company select a fraction of its property to which the rate applied and prove confiscation as to that fraction.

Alabama, &c., Ry. vs. Mississippi R. R. Com., 203 U. S. 496.

The railway company had fixed a local rate available to some shippers and the railroad commission prescribed the same rate available to all. The question whether the rate afforded a reasonable compensation for the service rendered was not involved. The Court said:

> "Even if a State may not compel a railroad company to do business at a loss and conceding that a railroad company may insist, as against the power of the State, upon the right to establish such rates

> as will afford reasonable compensation for the services rendered, yet when it voluntarily establishes local rates for some shippers it cannot resist the power of the State to enforce the same rates for all" (p. 501).

(c) *The Commission's order was made under a clear error of law.*

The order of the Commission necessarily rests upon its theory that the terminal charge of the carriers did not and could not embrace any element of cost except the trackage charge of the Stock Yards Company. This theory is a pure error of law. The necessary legal deduction from the lawfully published schedules of the appellees is that the terminal charge embraces, and is the sole compensation for, all the elements of cost involved in the service between the appellees' tracks and the Stock Yards. The Commission's error of law in this respect is so fundamental as to vitiate its order. Thus a clear case exists for setting aside that order without in any respect undertaking to review the Commission's conclusions upon questions of fact. Indeed, the setting aside of the order is in strict accordance with and demanded by the Commission's conclusions upon questions of fact.

(d) *The foregoing considerations are not affected by the Commission's conclusion that the $2 terminal charge violates Section 3 of the Act.*

The Commission's conclusion that the terminal charge violates Section 3 of the Act relates back to and is sustained solely by the Commission's preceding conclusion that to the extent of one dollar the $2 terminal charge is unreasonable and without justification. The Commission holds

(Record, page 50) that the terminal charge is unduly preferential only to the extent that it is without "some justifying excuse," and the Commission holds the $2 charge unduly preferential to the extent of one dollar only because the Commission is of opinion that to that extent the terminal charge is without sufficient justification.

This point is further illustrated by the Commission's opinions upon the original complaint. The Commission held that the terminal charge, if just and reasonable, would not be an undue preference (7 I. C. Rep., 540), and was an undue preference only to the extent that the charge was unjustifiable (7 I. C. Rep., 555*k*).

V.

The power of the Courts to set aside orders of the Commission.

We believe that this case must be disposed of upon the foregoing considerations, and that it will not be necessary to consider the general question of the extent of the power of the courts to set aside orders of the Commission. But as Commission's counsel refer to that general question, we shall discuss it also.

(*a*) *The Commission's authority is limited by the statute as well as by the Constitution.*

Commission's counsel claim that the Commission can lawfully prescribe any rate which is not so unreasonably low as to deprive the carrier of property without due process of law in violation of the Fifth Amendment to the Constitution.

The Constitution gives Congress the power to regulate commerce among the States. This power has no other limitations than such as are imposed by the Constitution itself.

But the Commission is created by statute and derives its powers solely from the statute, and is limited by the statute, as well as by the Constitution.

The same principle which requires the courts to arrest the enforcement of an act of Congress when that act transcends the limitations prescribed by the Constitution requires the courts to arrest an act of the Commission when that act transcends the limitations of either the Constitution or the statute.

The contention that the courts cannot set aside a rate prescribed by a Commission under legislative authority unless such rate violates the Constitution is apparently based upon observations of this Court in cases involving the question whether the Fourteenth Amendment of the Federal Constitution was violated by rates prescribed under State authority. In those cases this court had no occasion to discuss the question whether the action of the State Commission was in conformity with the State statute. Therefore, such cases are not authority for the proposition that the Federal courts have no power to set aside rates prescribed by a Commission created by a Federal statute, except when such rates violate the Constitution.

To determine the extent of the Commission's power, and the scope of judicial review with respect to the exercise of that power, it is essential to consider what power can be and has been validly conferred upon the Commission by the Act to Regulate Commerce.

(b) The power that can be conferred lawfully upon the Commission.

The question of the extent to which a power to prescribe maximum rates may be intrusted to a commission has been much considered. In an opinion of the Attorney General of the United States to the Chairman of the Senate Committee on Interstate Commerce, dated May 5th, 1905, the prevailing view upon this question was correctly stated as follows:

> "Although legislative power, properly speaking, cannot be delegated, the law-making body, having enacted into law the standard of charges which shall control, may intrust to an administrative body not exercising in the true sense judicial power the duty to fix rates in conformity with that standard" (Hearings before the Committee on Interstate Commerce, United States Senate, volume 2, 1662, 1674).

Thus an essential part of any such delegation of power is that the standard of charges which shall control shall be enacted into law by Congress itself, and thereupon such standard of charges becomes necessarily a rule of law. With respect to such standard of charges the following observations are necessarily true:

First. The standard being a rule of law must be such that the courts can understand it. It is inconceivable in our form of government that any rule of conduct can have the force of law if so peculiar or indefinite in character as not to admit of being understood by the courts. If the standard of charges which shall control the Commission cannot be understood by the courts, then that standard cannot be a law, and there is a complete failure of the basis

which alone can support a delegation of power to the Commission.

SECOND. If the Commission in the attempted performance of its duties is not controlled by the standard enacted by Congress, then the Commission's action is void because in conflict with the law which alone authorizes the Commission to act. It follows that whenever a controversy comes properly before the courts and the rights of the parties depend upon the question whether or not the action of the Commission is valid, the courts have the power to determine whether or not that action conforms to the standard prescribed by law.

(c) *The power that has been conferred upon the Commission.*

By section 15 of the act the Commission is authorized to prescribe a maximum rate only when of the opinion that the rate of the carrier violates the provisions of the act. In that even the Commission is required to "determine and prescribe what will be the just and reasonable rate," to be thereafter observed as the maximum. This is a positive mandate to the Commission to prescribe rates that will conform to the legal standard, and is an equally positive mandate to the Commission not to prescribe rates which do not conform to the legal standard.

The standard which Congress has prescribed is capable of judicial cognizance and if necessary of judicial application. The Commission is to act only when of opinion that the rates or practices of the carrier "are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of

this Act," and in such cases the Commission is required to determine and prescribe "just and reasonable" maximum rates and "just, fair and reasonable" regulations or practices; and the Commission is required to make an order that the carrier "shall cease and desist from such violation to the extent to which the Commission find the same to exist." The standards thus employed by Congress as the rule to control the Commission are the standards which have been in the Act to Regulate Commerce since its original enactment in 1887, and have never been substantially modified since their original adoption. These standards are found in sections 1, 2, and 3 of the Act.

Section 1 provides that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." Section 2 defines "unjust discrimination" to consist in charging one person greater or less compensation than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Section 3 declares that it shall be unlawful for any carrier to give any undue or unreasonable preference or advantage to any person, locality or description of traffic in any respect whatsoever.

These provisions of the Act have been the subject of judicial cognizance and application from the passage of the Act in 1887. The delegation of power to the Commission by the Hepburn Act has not changed in the slightest the scope or meaning of these provisions. Considerations which the

courts could not have entertained prior to the Hepburn Act cannot properly be entertained by the Commission under the Hepburn Act. The Commission is no more free under the Hepburn Act than were the courts prior to that Act, to enlarge the meaning or operation of sections 1, 2, and 3.

(*d*) *The courts can set aside an order of the Commission for any failure to conform to the statute.*

The Commission's opinion that the rate of the carrier violates the act is not necessarily final. If that opinion is clearly wrong, the courts will disregard it and hold that there is no basis for the Commission's order. Thus in School of Magnetic Healing *vs.* McAnnulty, 187 U. S., 94, it appeared that the statute provided that "the Postmaster General may upon evidence satisfactory to him" that any person is engaged in specified fraudulent schemes instruct postmasters to intercept registered mail addressed to such persons. The Postmaster General "upon evidence satisfactory to him" decided that the School of Magnetic Healing was engaged in a fraudulent scheme and issued an order to intercept registered letters addressed to the school. The Court, notwithstanding the Postmaster General's decision, determined that the school was not a fraudulent scheme, and therefore held the order void.

It is clear that the Commission, under its power to prescribe a rate that conforms to the act, has no power to prescribe a rate that violates the act, and that the courts may set aside any such unlawful order.

Upon the question how far the courts may go in overruling the action of an administrative board, Commission's

counsel quotes as follows from Bates & Guild Co. *vs.* Payne, 194 U. S., 106:

> "The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not, ordinarily, review it, although they may have the power, and will occasionally exercise the right of so doing."

It will be observed that the power thus recognized in the Court to review administrative decisions upon mixed questions of law and fact, or of law alone, is a power which may be exercised without any regard to the question whether there has been a violation of the Constitution. It will be observed also that this doctrine was announced with reference to determinations as to the privilege of using the postal service. This Court explained in Public Clearing House *vs.* Coyne, 194 U. S., 497, 506, that the privilege of using the postal service is a matter within the discretion of Congress, and on a very different footing from the protection of liberty or property, and the administration of public justice. Certainly the owners of railroad property (and "railroads are the private property of their owners"—Int. Com. Com. *vs.* Chicago Great Western, 209 U. S., 108, 118), may rightfully demand a fuller measure of judicial protection against arbitrary administrative action than the Courts may be disposed to accord with respect to the privilege to use the United States mail.

But even according to the rule just quoted from Bates & Guild *vs.* Payne, it is perfectly clear that the Court has

power to set aside an order of the Commission when not in conformity with the law, even if the Constitution be not violated by such order.

It may be that where there is a dispute as to particular facts the Commission's decision would rarely be interfered with. But many of the very important questions involved are matters of deductions from admitted facts. While, doubtless, the Court would be strongly inclined to adopt the Commission's deductions, we submit that there is no rule of law or policy that such deductions must be held to be conclusive.

But after all, most of the important questions are questions of law as to the intent and effect of Sections 1, 2 and 3 of the Act. The Court clearly has the power to set aside an order of the Commission when such order proceeds upon an erroneous construction of the effect of Sections 1, 2 and 3, or, indeed, upon an error of law in any other respect.

It is submitted that it would be extremely unfortunate for the courts to commit themselves unnecessarily at this time to the view that the Commission's conclusions upon questions of law, or the Commission's deductions from admitted facts, are necessarily conclusive. If the original Interstate Commerce Act had given the Commission the power to prescribe rates, and such a doctrine of finality had been attached to the Commission's conclusions upon questions of law and as to the Commission's deductions from admitted facts, the most widespread injustice and injury would have been occasioned. This is evident from a glance at the various decisions in which this Court has had occasion to consider the views of the Commission (see Interstate Com. Com. *v.* Baltimore & O. R. Co., 145 U. S., 263; Texas & P.

Ry. Co. *v.* Interstate Com. Com., 162 U. S., 197; Interstate Com. Com. *v.* Alabama Midland R. Co., 168 U. S., 144; Louisville & N. R. Co. *v.* Behlmer, 175 U. S., 648; East Tenn. V. & G. R. Co. *v.* Interstate Com. Com., 181 U. S., 1; Interstate Com. Com *v.* Chicago Great Western R. Co., 209 U. S., 108).

(*e*) *Judicial intervention is expressly contemplated by the Act itself.*

The courts in exercising their full power to determine whether the orders of the Commission conform to the statute will do only what is contemplated by the act itself.

Section 15 expressly recognizes that the orders of the Commission may "be suspended or set aside by a court of competent jurisdiction." Section 16 prescribes the venue of such suits and expressly provides that "jurisdiction to hear and determine those suits is hereby vested in such courts."

(*f*) *Judicial intervention is especially appropriate because the regulation is of vested rights, and not of matters wholly within the power of the Government.*

In this respect there is an important distinction between the regulation of railroad rates and regulations regarding the disposal of Government lands, or the transmission of matter in the United States mails, or the exclusion of aliens or of imports. All of these matters are solely within the control of the Government, and individual privileges in respect thereto exist solely by virtue of governmental consent. Therefore, as to such matters, method of administration may be appropriate which would be wholly inappropriate with respect to

matters involving important vested rights. The right of the owners of railroads to adequate protection in the enjoyment of their business is a right which exists independent of the consent of the Government.

(g) *Such judicial intervention is consistent with all the authorities.*

There is nothing in the expressions of the courts in other cases to cast doubt upon the right of the courts to inquire into any sort of illegality in the Commission's orders.

Such inquiry does not partake in any sense of the character of rate making. The Court does not make a rate when it ascertains and declares an order of the Commission to be unlawful. Obviously this is true when the Court declares such order to violate the Constitution, and it is equally true when the Court declares such order to violate the statute for any reason.

The expressions of this Court in cases of State action arising under the Fourteenth Amendment are not applicable. This Court properly accepts the action of the State tribunals as being in accord with the laws of the State, and hence no question arises as to whether the rates prescribed are in conformity with the delegation of power to the State Commission. The question that does arise is whether contrary to the Fourteenth Amendment the State has deprived a person of property without due process of law or denied the equal protection of the laws.

Respectfully submitted.

WALKER D. HINES,
Of Counsel for Appellees.

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Supreme Court of the United States

OCTOBER TERM, 1909.

No. 251.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
vs.
ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, RECEIVERS OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

BRIEF OF APPELLEES.

WILLIAM D. McHUGH,
Solicitor for Appellees.

OMAHA PRINTING COMPANY, OMAHA, NEB.

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Appellees.

BRIEF OF APPELLEES.

The proceeding in which the present appeal has been taken, was begun by the filing of a bill in equity by the appellees, as complainants, in the Circuit Court of the United States for the Eighth Circuit, against the Interstate Commerce Commission, appellant, for the purpose of suspending and annulling a certain order entered by the Interstate Commerce Commission, which order was in the words and figures following, to-wit, (See p. 8 of record):

> "It is ordered that the defendants, The Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company; and Illinois Central Railroad Company, be, and they are hereby required to cease and

desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that state, their present terminal charge of $2.00 per car.

"It is further ordered, that said defendants be, and they are hereby notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the state of Illinois, a terminal charge which shall not exceed $1.00 per car, if any terminal charge is maintained by them."

An application was made in said action, upon due notice, for an interlocutory order suspending the order of the commission and enjoining its enforcement pending the trial of the cause. The said application came on to be heard before Judges Walter H. Sanborn, William C. Hook and Elmer B. Adams, Circuit Judges, and was argued upon the pleadings and showing duly filed. Upon consideration, the court unanimously decreed that the order of the Interstate Commerce Commission be suspended and its enforcement enjoined until the further order of the court.

From this interlocutory decree of the court, this appeal has been perfected under section 16 of the Interstate Commerce Act, as amended in 1906.

STATEMENT OF FACTS.

The Chicago Great Western Railway Company, Chicago, Burlington & Quincy Railroad Company, The Illinois Central Railroad Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Chicago & Alton Railroad Company, The Chicago, Rock Island & Pacific Railway Company and The Atchison, Topeka & Santa Fe Railway Company, appellees herein, are common carriers engaged in the transportation of property by railroad by continuous carriage of shipment from points in the States of Texas, Oklahoma, Kansas, Montana, North Dakota, South Dakota, Nebraska, Wyoming, Colorado and Indian Territory to Chicago in the State of Illinois, and have been so engaged for many years last past. The transportation of live stock from the states aforesaid to the City of Chicago is one of the important constituents in the business of said companies.

There have been established and exist in the City of Chicago, certain stock yards owned and operated by the Union Stock Yard & Transit Company, known as the Union Stock Yards, which consist of yards, pens and chutes, together with numerous and extensive buildings, and said Union Stock Yard & Transit Company also owns railway approaches to said stock yards aggregating about two hundred and forty (240) miles of railroad tracks, all of which are within the City of Chicago aforesaid; the said stock yards are the largest and most extensive in the United States and adjacent thereto are numerous extensive packing houses, and said stock

yards constitute the largest market for the sale and purchase of live stock in the United States.

The tracks of all of said railroad companies, appellees, terminate in the City of Chicago, and all have terminal facilities in said City of Chicago equipped for the business of said companies and sufficient for delivery of all freight consigned for delivery at such terminals; but none of the railroad tracks owned, controlled or operated by any of said appellees extend to or terminate at the said stock yards of the said Union Stock Yard & Transit Company; in order that appellees may deliver any cars of live stock at said Union Stock Yards, it is necessary that they use the lines of track of the said Union Stock Yard & Transit Company, and, in some instances, in addition thereto, the tracks of other companies.

Said appellees have established and duly filed, published and posted, according to law, tariffs of charges for the transportation of live stock to the City of Chicago, some of the said rates being for transportation of live stock entirely upon the lines of the company issuing said tariff and a large number of other tariffs being joint tariffs issued by appellees in connection with other companies, which other companies participating in such joint tariffs do not have lines reaching to the City of Chicago.

The delivery of live stock at the said Union Stock yards by appellees involves the distinct and special service by them, in said City of Chicago, of transporting the said live stock beyond the lines of their respective railways and over the lines of other railroad companies and over the tracks of the said Union Stock Yard & Transit Company, and the unloading of the said live stock at said Union Stock Yards.

Before the said Union Stock Yards were established, all live stock delivered in Chicago by appellees was delivered by each company at its own terminals on its own tracks; and the established rate for the transportation of live stock to Chicago included only the transportation to and delivery at the said terminals of the said companies on their own tracks in the said City of Chicago.

When the said Union Stock Yards were established and shippers of live stock desired the delivery of their live stock at the said Union Stock Yards, appellees did deliver such live stock at the said stock yards beyond the lines of their tracks, without making any special charge or receiving any special compensation for the said special service of transporting the same beyond the lines of the railways of appellees and delivering the same to the said stock yards; although the said Union Stock Yard & Transit Company charged and appellees paid twenty-five cents per car for unloading the said live stock at the said stock yards and said transportation and delivery beyond the lines of appellee's tracks without special charge or compensation was continued until 1894.

In 1894 the said Union Stock Yard & Transit Company imposed upon all of appellees a trackage charge for the use of its tracks in the transportation of live stock between the lines of the appellees' railroads and the said Union Stock Yards; said trackage charge varied in accordance with the distance traversed over said tracks, being in no case less than eighty cents per car and in some cases as high as one dollar and a half per car.

The increased expense involved in the delivery of live stock beyond the lines of appellees' tracks to said stock yards, by reason of the said imposition of said

trackage charges by said Union Stock Yard & Transit Company, and the enhanced complexity and general cost of such special service, made it impracticable for appellees longer to continue to make said delivery of said live stock beyond the lines of their respective railroad tracks without any special charge or compensation therefor; thereupon, appellees taking into account the charges exacted by the said Union Stock Yard & Transit Company, as aforesaid, and the expense to them of the transportation and delivery of said live stock beyond their lines to said stock yards, issued, published, filed and posted in all respects according to law their separate tariffs, showing that they would charge shippers of live stock the sum of two dollars per car in addition to the Chicago rate for transporting each car of live stock beyond the lines of their respective roads and making delivery thereof at said Union Stock Yards. The said provision of said tariffs was embodied in a joint circular, the same being as follows:

> "On and after June the 1st, 1894, a terminal charge of $2.00 per car will be made in addition to the Chicago rates as shown in the tariffs of the Western Freight Association on live stock and other freight received from or delivered to the stock yards or industries located on the tracks of the Union Stock Yards Railway, the Indiana Line Railway and the Northern Indiana Railroad."

The changes made in said tariffs were intended by appellees and their officers to mean, and appellees and their officers understood the said tariffs to mean, that the said charge of two dollars per car was the sole and only charge and compensation made or received by appellees for the service of transporting said cars of live

stock beyond the lines of their respective roads and making delivery of the same at said Union Stock Yards; and that said charge of two dollars per car for said service was segregated from and entirely separate from the charge in the tariffs for the transportation of said live stock from the points of the origin of the shipments to a delivery point on the tracks of appellees in the City of Chicago; and in making, issuing, publishing and filing the said terminal tariffs, appellees and their respective officers intended to provide, and believed that the said tariffs did provide and construed the said tariffs to provide that the charge made for the transportation of live stock from the points of origin of the shipments to the said City of Chicago was solely and exclusively for the service involved in the transportation of said live stock from said points of origin of the shipments to a point of delivery on the tracks of appellees, respectively, in the City of Chicago, and that the said last named charge did not cover or carry any compensation whatever for the transportation and delivery of such live stock beyond the lines of the railroads of appellees and did not cover or carry any compensation whatever for the transportation and delivery of said live stock from the lines of appellees in the City of Chicago to the said Union Stock Yards.

When the said tariffs were issued, published and filed in 1894, as aforesaid, there was no change made in the charge made in earlier tariffs for the transportation of live stock from the points of the origin of the shipments to the City of Chicago, and no change made in the joint rates or tariffs issued, published and posted by appellees in connection with other railroad companies, in so far as

the same fixed the charge for the transportation of live stock from the points of origin of the shipments to the City of Chicago, nor was there any change made in the division or the adjustment of the proportions of said charge made in said joint tariffs, between the companies issuing the same. And at no time was any joint rate agreed upon, issued, published or posted by appellees and other railroad companies for the transportation of live stock from the points of origin of the shipments to the City of Chicago wherein any division of the rates between the companies making the same was based upon any consideration whatever of the cost and expense of transporting such live stock beyond the tracks of appellees in the City of Chicago and making delivery thereof at the Union Stock Yards aforesaid.

Soon after the promulgation of the said circular and the publication of said tariffs, litigation arose respecting the validity of the said two dollar terminal charge. But as this litigation culminated in a decision of this court, (186 U. S. 320) in which all of the history of the controversy and the nature of the litigation mentioned was fully reviewed and clearly stated in the opinion, a cursory reference to the litigation will suffice for the present purpose. At the time of the promulgation of the said circular and the publication of the said tariff imposing the said $2 terminal charge, the Atchison, Topeka & Santa Fe Railroad Company was in the hands of receivers. An application was made to the court in which the receivership proceedings were pending, for an order requiring the receivers to desist from the imposition of said charge. This application came before the Circuit Court of Appeals for the Seventh Circuit and the application was,

by that court, dismissed, and the order prayed for, denied. (*Walker v. Keenan*, 73 Fed. 755.)

Afterwards, the Cattle Raisers' Association of Texas instituted a proceeding before the Interstate Commerce Commission complaining of the said $2 terminal charge as illegal. After full hearing that body held that as the railroad companies had for many years delivered live stock at the Union Stock Yards and beyond their own rails under their tariffs fixing the charge for the transportation of live stock from points of origin of the shipment to the City of Chicago, they had thereby construed their tariffs so as to make the charge, therein imposed, carry compensation for the entire transportation of live stock from the points of origin to the Union Stock Yards, aforesaid; and while that body held that the $2 terminal charge did not exceed the cost of this service of transporting the live stock from the rails of the companies in the City of Chicago to the Union Stock Yards and there making delivery thereof, yet when the sum of $2 per car was added to the compensation already laid in their tariffs for that service, the same was excessive. In other words, the Commission held that while the $2 terminal charge, if considered by itself as a separate charge for the separate service of transporting the live stock beyond the rails of the companies to the Union Stock Yards and there making delivery thereof, was reasonable and proper, yet, under the tariffs of the companies as published, the terminal charge could not be so separately considered.

The Commission, therefore, held that the $2 charge was unreasonable, and that any charge in excess of $1.00 per car was unreasonable. And the carriers were thereupon ordered to desist from making any terminal charge in excess of $1.00 per car.

The railroad companies refusing to obey this order of the Commission, suit was begun to compel compliance therewith. The proceeding was dismissed upon its merits by the Circuit Court, and on appeal the decree of the Circuit Court was affirmed by the Circuit Court of Appeals. The case was then taken to this court where the matter was fully considered and an elaborate opinion filed in which the facts relating to the controversy were fully and clearly set forth. (See *I. C. C. v. C., B. & Q. R. R. Co., et al.*, 186 U. S. 320.)

This court, upon full argument, decided that the railroad companies had the legal right to segregate their charge for the separate service of transporting cars of live stock beyond the lines of their tracks to the said Union Stock Yards, and there making delivery thereof, from the charge for the transportation of said live stock from the point of origin to the City of Chicago. But the court, examining the provisions of the said tariffs as embodied in the said circular, decided that in view of the long continued usage and practice of the railroad companies in transporting live stock to the Stock Yards aforesaid, and there making delivery thereof for the charge fixed in their tariffs for the transportation of such live stock to the City of Chicago, the carriers had placed a construction upon the said tariffs to the effect that the transportation charge as laid in said tariffs for the transportation to the City of Chicago included compensation for the service of delivering the same beyond the lines of the respective companies and to the said Stock Yards; and that the joint and circular tariffs aforesaid, constituted merely the making of an additional charge for a service already covered by the charge laid in the tariffs. This court, there-

fore, holding that addition was not division, decided that the imposition of the additional $2 charge as made by the said tariffs and circular, was not in effect a segregation of the transportation charge to the City of Chicago from the terminal charge from the tracks of the companies to the said Stock Yards. In other words, although this court held that the railroad companies had the right to segregate these two charges for the two separate services, they had not, in the said circular and tariffs, done so.

Moreover, the court having held that the tariff provisions embodied in the circular merely added $2 to the charge for the aggregate service of transporting live stock from points of origin to the said Union Stock Yards, the reasonableness thereof must be considered in the light of all of the circumstances surrounding the said aggregate charge. And, it having appeared from the report of the said Commission that the aggregate charge for such transportation had been reduced from certain undisclosed territory, it followed that the aggregate charge as increased by the $2 charge might not be unreasonable as related to the territory within which the said reductions had been made; and as the record did not disclose the boundaries of such territory the decree of the court of appeals was affirmed, it being provided that nothing in the decree should be construed so as to prevent the Interstate Commerce Commission from commencing proceedings to correct any unreasonableness in the rate resulting from the additional terminal charges as to any territory to which the reduction referred to in the opinion, did not apply.

Promptly upon the announcement of the said decision by this court, the railroad companies, appellees, proceeded to revise their tariffs for the transportation of live

stock, so as to divide their rates and to segregate definitely and beyond possibility of doubt, their charge for the terminal service of transporting live stock from their terminals to the said Stock Yards and there making delivery, from their charge for the transportation of such live stock from the points of origin to the terminals of the said railroad companies in the City of Chicago. One separate and distinct charge, was in said tariffs plainly laid for the separate service of transporting live stock from the points of origin to the terminals of said companies in Chicago; and one separate and distinct terminal charge of $2 per car was, in said tariffs, plainly laid for the separate service of transporting said cars of live stock beyond the tracks of said companies in Chicago to the said Stock Yards, and there making delivery thereof. The tariff of the Chicago & Northwestern Railway Company as published, subsequent to and pursuant to the decision of this court, above mentioned, provided as follows:

> "The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at, or received and transported from the stock yards of the Company at Mayfair, in Chicago.
>
> "Upon all live stock consigned to or from the Union Stock Yards in Chicago, or industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway, aforesaid, a charge of two dollars ($2.00) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards, or to said industries on said Union Stock Yards Railway, or the Indiana State

> Line Railway, from this company's own rails, or of transporting such cars from said Union Stock Yards or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway to this company's own rails."

The other railroad companies, appellees, filed similar modifications to their tariffs, and all effected the segregation of the two charges in such manner that the charge laid in the said tariffs for the transportation of live stock from the points of origin of the shipments to the point of delivery upon the tracks of the said railroad companies respectively in the City of Chicago, was laid and collected, solely and exclusively for the service rendered in transporting such live stock from points of origin of the shipment to the point of delivery upon the tracks of said railroad companies respectively in the City of Chicago; and the charge laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said railroad companies and to the said Union Stock Yards was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of such railroad companies and delivering the same at the Union Stock Yards.

These provisions in the said tariffs have been constantly maintained in all the published tariffs of the railroad companies relating to the transportation of live stock, and are now being maintained in all the tariffs in force issued, filed, published and posted by the appellees.

Thus, from the time of the said decision of this court to the present time, there has been a complete segregation and separation under the tariffs of appellees for the transportation of live stock, of

the charge laid in the said tariffs for the transportation of live stock from the points of origin of the shipments to a point of delivery on the tracks of said companies in the City of Chicago, from the charge laid in said tariffs for the transportation and delivery of said live stock beyond the tracks of said companies in the City of Chicago to the Union Stock Yards aforesaid; with the result that during all of said years, the charge laid in the said tariffs for the transportation of live stock from the points of origin of the shipments to the point of delivery upon the tracks of said companies in the City of Chicago, was laid and collected solely and exclusively for the service rendered in transporting such live stock from the points of origin of the shipments to the point of delivery upon the tracks of said companies in the City of Chicago; and the charge laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said companies and to the Union Stock Yards aforesaid, was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of said company and delivering the same at the Union Stock Yards, aforesaid.

Moreover, the railroad companies actually separated the moneys received under these separate charges; all the moneys received for the transportation of live stock from the points of origin of the shipments to the terminals of said companies in the City of Chicago was entered into the account of freight earnings; while the revenue from the $2 terminal charge was entered in another account and credited to miscellaneous earnings or switching charges.

Thereafter, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange filed a petition with

the Interstate Commerce Commission, and prayed that body to re-open the case, hear further evidence and order the railroad companies to desist from the imposition of the $2.00 charge. The case was accordingly reopened and leave given to introduce further testimony. After full hearing, the Interstate Commerce Commission entered an order requiring the railroad companies to desist from the imposition of the $2.00 charge with respect to all except certain defined territory. This order was made August 16th, 1905; the order was not obeyed, and no proceedings whatever were begun for its enforcement.

In June, 1906, the Interstate Commerce Act was amended by the passage of what is known as the Hepburn Act; and on December 3rd, 1906, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange filed a petition with the Interstate Commerce Commission alleging that the imposition of the $2.00 terminal charge was unlawful, and praying that the commission order the carriers to desist from making any terminal charge whatever for said service, or, if in the opinion of the Commission such charge might be made, then that the commission fix the amount of such charge. The manifest purpose of the proceeding was to gain the benefit of the increased authority conferred upon the Interstate Commerce Commission by the amendment of the Interstate Commerce Law.

After full hearing the Interstate Commerce Commission adhered to its former holdings in the matter; it found that the cost to the railroad companies of transporting the live stock from the tracks of said companies to the stock yards and there making delivery thereof, was more than the sum of $2.00 per car. But it held that the

reasonableness of this terminal charge should not be considered by itself, but in connection with the charge made for the transportation of such live stock from the points of origin to the terminals of the railroad companies in the City of Chicago; and that, so considering the said terminal charge in connection with the transportation charge, the Commission decided that a terminal charge of $2.00 per car was unreasonable, but that a terminal charge of $1.00 per car was reasonable.

The Commission ordered the railroad companies to desist from the imposition of the charge of $2.00 per car for the terminal service, and ordered them to charge not more than $1.00 per car for such service.

Thereupon, the carriers instituted this proceeding by the filing of a bill in equity to secure the cancellation of the said order and an injunction restraining its enforcement. Answer was filed by the commission, to which replication was duly filed; an application was made for an interlocutory order suspending the order of the commission and enjoining its enforcement pending the trial of the cause. Affidavits were filed in support of the application setting forth the tariffs of the various companies, whereby the segregation above mentioned was effected, and also showing how the railroad companies carried the two charges separately upon their books. Due notice of the application was given, pursuant to the statute, and the same came on regularly before three of the Circuit Judges of the Eighth Circuit. The unanimous opinion of the judges was to the effect that the railroad companies had a right to segregate their charge for the terminal service of transporting the live stock beyond their tracks to the said stock yards and there

making delivery thereof, from their charge for the transportation of the live stock from the points of origin to their terminals in the City of Chicago. The judges further held that the railroad companies had, by their tariffs, segregated these charges. The judges further held that the terminal charge of $2.00 per car was reasonable, since it was conceded by the Commission that the cost to the carriers of the special service for which the charge was made was more than the said charge of $2.00 per car.

The court thereupon entered an interlocutory order or decree suspending the said order of the Interstate Commerce Commission and enjoining its enforcement pending the further order of the court. From this interlocutory order or decree, this appeal has been perfected to this court.

ARGUMENT.

This case presents for decision but three questions:

1. Have the railroad companies, appellees, the legal right to segregate their charge for the transportation of live stock beyond their terminals in the City of Chicago over the tracks of other companies to the Union Stock Yards Company and there make delivery thereof, from their charge for the transportation of such live stock from the points of origin to their terminals in the City of Chicago?

2. Have the railroad companies, appellees, exercised this right and segregated the said charges?

3. Is the separate terminal charge of $2.00 per car imposed for the separate service of transporting live stock from the terminals of the railroad companies

in the City of Chicago over the tracks of other companies to the Union Stock Yards and there making delivery thereof, a reasonable charge for such service?

The questions will be considered in the order named.

I.

Railroad companies have a legal right to divide their rates and thus make a definite charge for transportation from the points of shipment to Chicago, and a separate terminal charge for delivery to the Stock Yards, a point beyond the lines of the respective carriers.

This proposition has been definitely and decisively determined by this court. In the case of *Interstate Commerce Commission v. C., B. & Q. R. R. Co.*, 186 U. S. 320 (p. 335) the court say:

> "As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers, was conceded by the Commission and was upheld by the Circuit Court of Appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the sixth section of the act to regulate commerce, wherein it is provided that the schedules of rates to be filed by carriers shall 'state separately the terminal charges and any rules or regulations which could in any wise change, affect or determine any part of the aggregate of said aforesaid rates and fares and charges.'"

II.

The railroad companies have divided their said rates and have made a distinct charge for transportation from the points of shipment to Chicago, and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers.

This fact is clear from the tariffs of the railroad companies in evidence in this case. The provision in the tariff of the Chicago & Northwestern R. R. Company is as follows (see p. 20 of Record):

> "The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at or received and transported from the stock yards of the company at Mayfair, in Chicago.
>
> "Upon all live stock consigned to or from the Union Stock Yards in Chicago or industries located on the Union Stock Yards Railway, or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway aforesaid, a charge of two dollars ($2.00) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards or to said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, from this company's own rails or of transporting such cars from said Union Stock Yards, or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, to this company's own rails."

The tariff of the Chicago & Alton R. R. Company is, on its face, a tariff applying only on live stock in car-

loads, between stations outside of Illinois and "Brighton Park (Chicago) Ill.," and in said tariffs is the following provision (p. 95 of record):

"Application of Rates.

"Shipments to and from the Union Stock Yards district, Chicago.

"Shipments consigned to or received from Union Stock Yards, Chicago, Ill., or industries located on the tracks of the Union Stock Yards Ry. will, in addition to the rates named in this tariff, be subject to a delivery charge of $2.00 per car, and $1.50 per car on shipments received from or delivered to the Northern Indiana R. R. at Hammond, Ind.

"Agents must insert the above charge in all shipping receipts, bills of lading, waybills, and stubs; or live stock contracts for shipment consigned to or coming from industries specified, showing same as a separate item in addition to the tariff rate to or from Brighton Park.

The provision in the tariffs of the Chicago, Rock Island and Pacific Railway Company is as follows, (p. 95 of record):

"94th Street Stock Yards, Chicago, Ill. The rails of Chicago, Rock Island & Pacific Railway do not reach Union Stock Yards, Chicago, Ill. The C., R. I. & P. Stock Yards at Chicago, Ill., are located at 94th street, and the Chicago rates named herein cover transportation charges between stations named and C., R. I. & P. 94th Street Stock Yards.

"Shipments to or from Union Stock Yards, etc. Charges as follows must be made in addition to the regular tariff rates on all C. L. shipments of freight (except on dressed beef and packing house products) received from or delivered to industries located on the tracks of the following roads:

"Chicago Junction Ry. (Union Stock Yards and Indiana State Line Divisions), Chicago, $2.00 per car.

"Northern Indiana R. R., Hammond, Ind., $1.50 per car.

"Agents should be particular to see that shipments are waybilled to the Union Stock Yards, Chicago, or to Washington Heights (when for 94th Street Stock Yards) as directed by shippers."

The provision in the tariffs of the Illinois Central Railway Company, is as follows (p. 96 of record):

"To and from Union Stock Yards.

"The rates on live stock, carloads, published in tariff, as amended, to and from Chicago, Ill., will apply when delivered to or shipped from this company's stock yards at Hawthorne, Ill., or Fordham, Ill., and do not include the cost of delivery to or from the Union Stock Yards, Chicago, Ill.

"The terminal charge provided for in I. C. R. R. Tariff No. 1-A, I. C. C. No. A-5950 or subsequent issues, will be assessed in addition to the rates published in this tariff on live stock, carloads, delivered in or shipped from the Union Stock Yards, Chicago, Ill.

"Agents will insert in live stock contracts for shipments destined to or shipped from the Union Stock Yards, the additional terminal charge referred to in the foregoing paragraph, as provided in I. C. R. R. Tariff No. 1-A, I. C. C. No. A-5950 or subsequent issues (File M-320-U. S. Yds.)"

The tariff of the Chicago, Milwaukee & St. Paul Railway Company is on its face a tariff between "Chicago, Ill. (Galewood Stock Yards)" and other stations and contains the following provision, (p. 96 of record):

"Terminal charge.

"Note—This company's railway does not reach the Chicago Union Stock Yards, and the rates given herein cover the transportation charges between the stations named and Galewood, Ill., Stock Yards, only. $2.00 per car in addition will be charged on

> live stock, carloads, when consigned to or from the Chicago Union Stock Yards. This terminal charge must be entered separately by waybilling agent in 'freight charge' column of waybill, also inserted on bill of lading and live stock contract."

The tariff of the Chicago, Burlington & Quincy Railroad Company is on its face a tariff of live stock between "Chicago, (Company's Stock Yards at Hawthorne)" and other stations. Throughout the said tariff, wherever the word "Chicago" is used, attention is called, by reference, to a foot note reading as follows:

> "These rates apply only to and from company's stock yards at Hawthorne, Ill. See last note, page 69, for further information."

On page 69 of said tariff is the following provision (p. 96 of record):

> "Live stock to or from Union Stock Yards, Chicago, Ill.
>
> "The rates herein published do not include delivery in Union Stock Yards, Chicago, Ill., and live stock under these rates will be delivered to and taken from the company's stock yards at Hawthorne, Ill.
>
> "In case delivery is desired in the Union Stock Yards, Chicago, or shipments are made therefrom, a terminal charge of $2.00 per car will be made for that service which will be added to the rates herein published to and from Chicago.
>
> "Agents in issuing live stock contracts for shipments destined to or from Union Stock Yards must insert the terminal charge in live stock contract, in addition to the rate to and from Chicago."

The tariff of the Atchison, Topeka & Santa Fe Ry. Co. is on its face a tariff of live stock between certain stations and "Chicago (Corwith Station)" the said tariff contains the following provisions (p. 97 of record):

"Important—Terminal charges.

"The live stock station and stock yards of the A., T. & S. F. Ry. Co., in Chicago, are located at Corwith, and the rates named herein as applicable to Chicago, only apply to live stock intended for delivery at the stock yards of said company at Corwith in said city.

"Upon all live stock consigned to the Union Stock Yards in Chicago or to industries located on the Union Stock Yards Railway or the Indiana State Line Railway (Chicago Junction Railway, lessee), and transported and delivered to said Union Stock Yards or to said industries located on said Union Stock Yards Railway or the Indiana State Line Railway aforesaid, an additional charge of two dollars ($2.00) per car will be added to the rates applicable to Corwith, for transporting such to said Union Stock Yards or to said industries on said Union Stock Yards or the Indiana State Line Railway, for delivery thereat; and one dollar and a half ($1.50) per car as a terminal charge will be made in addition to the Chicago rates on shipments received from or delivered to the Northern Indiana Railroad at Hammond.

"The attention of the shipper must be and is called to the fact that the transportation charge on live stock delivered at our own yards at Corwith in Chicago will be two dollars ($2.00) per car less than when delivered at the Union Stock Yards at Chicago, or at industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and the agent should ascertain definitely at which point the shipper desires delivery to be made. The live stock contract must then be filled out so as to show the correct destination and rate as provided by the tariff and amendments.

"Care must also be taken to have the stock correctly billed, either to Corwith in Chicago, or Union Stock Yards at Chicago, or industries located on the Union Stock Yards Railway or the Indiana State Line Railway as designated by the shipper, and the correct rate shown in the billing.

"Bills of lading covering freight to and from the Union Stock Yards, or industries located on

> the Union Stock Yards Railway or the Indiana State Line Railway must provide for the above terminal charges.
>
> "In waybilling shipments destined to or coming from the Union Stock Yards, etc., the terminal charges if any, must be shown separately in the freight column."

It further appears from the waybills added as exhibits to the various affidavits filed in this case, that the item of $2.00 for the terminal service of the railroads is entered separately from the freight charge. (Pages 21-32 of record): And it further appears from the affidavits of Kirkman (page 21 of record), Krebs (page 23 of record), Sturgis (page 29 of record) and Bailey (page 31 of record), that, upon the books and accounts of the companies named, the revenues received from the $2.00 terminal charge are credited to miscellaneous earnings or switching earnings, while the revenues received from the charge for transporting the live stock to the terminals of the companies in Chicago, are credited to freight earnings.

It appears that, after the decision of this court in the case above mentioned, and pursuant to that decision, the railroad companies have distinctly and in unequivocal terms divided their rates, and thus made a distinct charge for the transportation from the point of origin of shipment to their respective terminals in Chicago, and a separate terminal charge for delivery beyond their lines to the stock yards. Clearer or more unequivocal language could not be used to effectuate this purpose.

III.

The separate terminal charge of $2.00 per car made by the railroad companies for the delivery by them of live stock to the Stock Yards, a point beyond the lines of their respective railroads is not excessive since it is less than the actual cost to the railroads for the performance of such service.

No contention was made in the court below, that the charge of $2.00 per car for the terminal services mentioned is unreasonable if considered as a separate charge for a separate service; and we presume no such contention will be made in this court. As was said by the learned judge in the opinion of the court below, (p. 89 of record), "Neither the commission in its reports nor learned counsel in their arguments attempted to justify the reduction on the ground that the charge as actually laid was too much for the particular service rendered, etc."

The Interstate Commerce Commission, in its various decisions with respect to this matter, has repeatedly found that the $2.00 terminal charge, if considered as a separate charge for a separate service, was reasonable. The commission distinctly says that the order was not entered "because $2.00 was an unreasonable charge for transporting a car to the stock yards if that service was performed by some independent agency." (See foot note to 186 U. S. 332.)

There is no need of reviewing the decisions of the commission upon this point, all of which were re-affirmed in the opinion upon the last hearing, since this court has,

from a reading of the said opinion, stated the findings and conclusion of the commission as follows (186 U. S. 326):

> "Considering the cost of delivery to the Stock Yards over the rails of the Stock Yards Company, including the sum paid for trackage and all other expenses, the Commission found as a matter of fact that $2 per car would be just and reasonable. A reference to this subject, found in the report of the Commission, is excerpted in the margin."

In its last opinion the Commission said (page 48 of record):

> "The original case did not show the cost of making delivery of other kinds of carload freight at this market, but the present record shows that the average cost to one defendant, the Atchison, Topeka & Santa Fe Railway Company, of delivering all kinds of carload freight, including live stock, is $5.40 per car, while the cost of delivering live stock is not far from $2 per car. The testimony further indicates that the average cost of delivering all kinds of carload freight does not differ much in the case of the Santa Fe from that in the case of the other defendants, although it does appear that several of the defendants are at greater expense than $2 per car in making delivery of live stock at the stock yards. We think it fairly appears upon this record that the total cost to these defendants delivering live stock at the Union Stock Yards, including the trackage charge, is not much, if any, above one-half the average cost of handling all carload freight in the City of Chicago."

That a railroad company is entitled to reasonable compensation for a separate service for which a separate charge is lawfully made, is settled by the recent decision of this court in *Southern Railway Company v. St. Louis Hay & Grain Company*, 214 U. S. 297.

We therefore submit that as the appellees, railroad companies, had a lawful right to divide their rates and make a distinct charge for the transportation of live stock from the point of shipment to their terminals in Chicago, and to make a separate terminal charge for the service of delivering live stock to the stock yards, a point beyond the lines of the appellees; and inasmuch as the appellees have so divided their rates and have made a separate and distinct charge for the separate and distinct service of transporting live stock from their terminals to the Union Stock Yards over the tracks of other companies and there making delivery thereof; and inasmuch as this separate terminal charge for this separate terminal service is, without dispute, just and reasonable, it follows that the order of the Interstate Commerce Commission was unlawful and should be set aside.

We respectfully refer the court to the elaborate and unanimous opinion of the three circuit judges who heard the case in the court below, which opinion is found on pages 86 to 93 of the record.

All of which is respectfully submitted.

WILLIAM D. MCHUGH,
Solicitor for Appellees.

In the Supreme Court of the United States

October Term, 1909

[redacted]

Appellants,

[redacted]

Appellees.

[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

INTERSTATE COMMERCE COMMISSION, Appellant, *v.* ALPHEUS B. STICKNEY AND CHARLES H. F. Smith, receivers of the Chicago Great Western Railway Company et al.	No. 251.

APPELLANT'S REPLY TO BRIEF OF WALKER D. HINES, OF COUNSEL FOR APPELLEES.

I.

Counsel for the appellees in the brief take the position that the facts of the case are different from what they were when the case was before this court in *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.* (186 U. S., 320) because of the change in the language of the tariffs so as to limit the application of the through rate to the stock pens alleged to exist on the rails of each of the appellees; that thereby the appellees divided their rate so that the $2 is the sole charge for the transportation from appellees' tracks to the Union Stock

Yards, and no part of the compensation embraced in the through rate is for any part of the service from their own pens to the Union Stock Yards, or for delivery expenses thereat.

Our reply to this is that the allegations of the bill dispute the contention that no part of the through rate embraces pay for any part of the service beyond the line of their rails or for delivery at the Union Stock Yards.

At page 3 it is alleged in the bill:

> That, in order that your orators may deliver any cars of live stock at said Union Stock Yards, it is necessary that your orators use the lines of track of the said Union Stock Yard and Transit Company, and in some instances, in addition thereto, the tracks of other companies.

And at page 9 it is alleged:

> Your orators further aver that the actual cost to each of your orators of the service of transporting cars of live stock beyond the tracks of your orators in the city of Chicago to the Union Stock Yards aforesaid and there making delivery thereof *exceeds, and ever since 1894 has exceeded, in each instance the sum of two dollars per car, the present terminal charge therefor*, and that under the present tariff and charge of two dollars per car for the said service your orators and each of them are now rendering the said service to shippers of live stock delivered at said Union Stock Yards of transporting the said cars of live stock beyond

> the tracks of your orator in Chicago to the Union Stock Yards, and there making delivery thereof at a *charge less than the actual expense* to your orators, respectively, necessarily incurred in the performance of the said service. (Italics ours.)

And again, on page 9, it is alleged that—

> The said order prohibits your orators from charging for the service aforesaid the said sum of two dollars per car, as above set forth, *which is less than the actual expense to your orators necessarily incurred in the performance of the service for which, as aforesaid, the said charge is laid.* (Italics ours.)

This court held unequivocally and the commission held that the through rate did comprehend the cost of delivery at the Union Stock Yards and that it would be conclusively presumed that no part of the service was performed as *a gratuity*. As to the soundness of that proposition there can be no doubt. It therefore is shown from the allegations of the bill just mentioned that some part of the expense is embraced in the through rate.

And again it is alleged in the bill (see p. 4 of the record):

> Your orators further aver that when the said Union Stock Yards were established and shippers of live stock desired the delivery of their live stock shipped over the lines of your orators' railways at the said Union Stock Yards, your orators did deliver such live stock at the said stock yards beyond the lines

of your orators' tracks *without making any charge or receiving any compensation for the said special service of transporting the same beyond the lines of your orators' railways and delivering the same to the said stock yards,* although the said Union Stock Yard and Transit Company charged your orators, and your orators paid, 25 cents per car for unloading the said live stock at the said stock yards; and said transportation and delivery beyond the lines of your orators' tracks *without charge or compensation was continued until 1894.*

And again it is alleged (at p. 5 of the Record):

> Your orators further aver that the increased expense involved in the delivery of live stock beyond the lines of your orators' tracks to said stock yards, by reason of the said imposition of said trackage charges by said Union Stock Yard and Transit Company and by reason of enhanced complexity and general cost of such special service, made it impracticable for your orators longer to continue to make said delivery of said live stock beyond the lines of their respective railroad tracks without any charge or compensation therefor.

The bill then sets out one of the tariffs of May 19, 1894, and alleges that:

> Said tariffs were intended by your orators and their officers to mean, and your orators and their officers understood the said tariffs to mean, that the said charge of $2 per car was the sole and only charge and compensation made or received by your orators for

> the service of transporting said cars of live stock beyond the lines of their respective roads and making delivery of the same at said Union Stock Yards; * * * (See Record, pp. 5, 6.)

And further it is alleged:

> That the charge made for the transportation of live stock from the points of origin of the shipments to the said city of Chicago was solely and exclusively for the service involved in the transportation of said live stock from said points of origin of the shipments to a point of delivery on the tracks of your orators, respectively, in the city of Chicago, and that the said last-named charge did not cover or carry any compensation whatever for the transportation and delivery of such live stock beyond the lines of the railroads of your orators and did not cover or carry any compensation whatever for the transportation and delivery of said live stock from the lines of your orators in the city of Chicago to the said Union Stock Yards. (See Record, p. 6.)

It was further alleged:

> That when the said tariffs were issued, published, and filed in 1894, as aforesaid, there was no change made in the charge made in earlier tariffs for the transportation of live stock from the points of the origin of the shipments to the tracks of the railroads of your orators in the city of Chicago, and no change made in the joint rates or tariffs issued, published, and posted by your orators in connection with other railroad companies. * * * nor was

> there any change made in the division or the adjustment of the proportions of said charge made in said joint tariffs between the companies issuing the same. (See Record, page 6.)

Then follows the allegation:

> Your orators further aver that thereafter and since the year 1902, in order that there be no possible misconception of the meaning of the said tariffs and of the purpose of your orators in promulgating the same, there were inserted in the tariffs regularly issued, filed, published, and posted by your orators, as required by law, further provisions making clear the absolute segregation and separation of the charge in said tariffs for the transportation of live stock from the points of the origin of the shipments to a point of delivery on the lines of your orators in the city of Chicago, from the charge in said tariffs for the transportation and delivery of the said live stock beyond the tracks of your orators in the city of Chicago to the Union Stock Yards aforesaid.

The object of the change in the tariffs, as is shown, was not to change the facts, but to state the intention of the carriers more certainly.

Then follows (Record, p. 7) a copy of the tariff of the Chicago & Northwestern Railway, referred to as published since 1902, in pursuance of the plan to make certain, et cetera, in which it is stated that "a charge of two dollars will be made for the separate and special service of transporting such cars to the

Union Stock Yards * * * from this company's own rails," et cetera.

It is then alleged that similar provisions were inserted in the tariffs of other lines.

Then follows the allegation (see Record, p. 7):

> Your orators further aver that from the year 1894 to the present time there has been a segregation and separation under the tariffs of your orators for the transportation of live stock of the charge laid in the tariffs of your orators for the transportation from the points of the origin of the shipments to a point of delivery on the tracks of your orators in the city of Chicago, from the charge laid in said tariffs for the transportation and delivery of said live stock beyond the tracks of your orators in the city of Chicago and to the Union Stock Yards aforesaid, with the result that the charge laid in the tariff for the transportation of live stock from the points of the origin of the shipments to the point of delivery upon the tracks of your orators in the city of Chicago was laid and collected solely and exclusively for the service rendered in transporting such live stock from the points of the origin of the shipments to the point of delivery upon the tracks of your orators in the city of Chicago; and the charge laid in the tariffs for the transportation and delivery of live stock beyond the tracks of your orators and to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of your orators and delivering the same at the Union Stock Yards aforesaid.

It follows from these allegations that the claim that the service from their respective stations to the Union Stock Yards continues to be a gratuity except for the $2 paid, and that the through rate embraces no compensation for that part of the expense which the $2 fails to cover is asserted in the bill. Therefore there has been no change in the facts. The only change is in what the complainants assert in the tariffs.

It also follows that admittedly there has been no segregation and separation as to that part of the expense which the $2 does not cover. There is no basis for a claim of segregation except that part of the terminal service is a gratuity.

It also admittedly follows that the express purpose of levying the charge of $2 was not to pay for terminal or delivery service, but only "for the separate and special service of transporting cars to the Union Stock Yards from the company's own rails," thereby expressly excluding the claim that the $2 was for the delivery service to which the commission had reference in the findings that the total expense amounted to more than $2 per car. There is neither allegation nor proof that it costs $1 for the service which the new tariffs declare the $2 was laid to cover.

As will be observed from the second of the foregoing quotations, it is expressly alleged that the service which costs more than $2 per car is the service of "transporting cars of live stock beyond the lines of your orators in the city of Chicago to the Union Stock Yards aforesaid and there making delivery," but the

tariff quoted in the bill does not mention delivery, confining the $2 to "transporting."

As shown on page 59 of the record, in the opinion of the commission, the appellees herein insisted that the commission should reconsider its finding that the service performed to June 1, 1894, was not a gratuity. That has always been their major premise. The very contention that was made before the commission and was made before this court in the previous case is now alleged in the bill, that previous to the imposition of the terminal charge of $2 the service was a gratuity. Both this court and the commission held that it was embraced in the through rate. By the very admission of the appellees, therefore, it continues to be so embraced except so far as the $2 pays for it, and that is confined to transporting the cars only as alleged. The bill does not contend that the length of line to which the through rate has always applied has been changed by the tariffs. It contends that the tariffs never did apply beyond that point; that the practice was to deliver to the stock yards without compensation, and afterwards the two-dollar charge was made, not to pay for the whole of the terminal service but for a part of it.

The compensation was therefore not withdrawn from the through rate, and there has been no segregation, and the change of the tariffs limiting the $2 to certain specified parts of the service in no wise changes the facts as to segregation. It could not possibly exist, except that part of the service is gratuitous, which theory they continue to assert in the bill.

II.

The claim that the Commission has investigated and reduced the terminal charge and also investigated and reduced the Chicago rate, mentioned on page 9 of Mr. Hines's brief, seems foreign to the case, but an examination of the opinion of the Commission in the case referred to, in connection with the two opinions of the Commission contained in the record, show the fact to be that the through rates naming the charge in cents per 100 pounds to the Missouri River markets, St. Louis, and Chicago, from portions of Texas, Oklahoma, New Mexico, and Colorado were examined by the Commission and held to be unreasonable, and at the same time the terminal charge as applied to those points, which were the points from which certain reductions had been made, was held to be unreasonable to the extent of $1 per car. The decision was perfectly consistent, because it left the roads the right to charge $1 per car as to those shipments.

WADE H. ELLIS,
Assistant to the Attorney-General.
S. H. COWAN,
Special Attorney.

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INTERSTATE COMMERCE COMMISSION *v.* STICKNEY AND OTHERS, RECEIVERS OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 251. Argued October 12, 1909.—Decided November 29, 1909.

A carrier may charge and receive compensation for services that it may render, or procure to be rendered, off its own line, or outside of the mere transportation thereover.

Where the terminal charge is reasonable it cannot be condemned, or the carrier charging it required to change it because prior charges of connecting carriers make the total rate unreasonable.

In determining whether the charge of a terminal company is or is not reasonable the fact that connecting carriers own the stock of the terminal company is immaterial, nor does that fact make the lines of the terminal company part of the lines or property of such connecting carriers.

The inquiry authorized by § 15 of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, relates to all charges made by the carrier; and, on such an inquiry, the carrier is entitled to have a finding that a particular charge is unreasonable before he is required to change it.

Where the charge of a terminal company is in itself reasonable the wrong of a shipper by excessive aggregate charges should be corrected by proceedings against the connecting carrier guilty of the wrong.

The convenience of the commission or the court is not the measure of justice, and will not justify striking down a terminal charge when the real overcharge is the fault of a prior carrier.

164 Fed. Rep. 638, affirmed.

ON December 10, 1907, the Interstate Commerce Commission entered an order requiring certain railroads running into Chicago to cease and desist from making a terminal charge of two dollars per car for the transportation of live stock beyond the tracks of said railroads in Chicago, and for delivery thereof at the Union Stock Yards, and requiring them to establish and put in force for said services a charge of one dollar per car. Compliance with this order was postponed by the commission until May 15, 1908. On May 7, 1908, the appellees filed this bill in the Circuit Court of the United States for the District of Minnesota, to restrain the enforcement of said order, averring that the actual cost to them for such terminal services exceeded in each instance the sum of two dollars per car, and that the companies were making delivery at a charge less than such actual cost; that therefore the reduction of the charge by the commission to one dollar per car was unreasonable, oppressive and unlawful. A hearing was had before three judges of the Eighth Circuit and a restraining order entered as prayed for by the railroad companies, from which order an appeal was taken to this court.

Mr. Wade H. Ellis, Assistant to the Attorney General, and *Mr. S. H. Cowan*, special attorney, for the appellant:

For the history of this controversy before the courts and the commission see *Keenan* v. *Atchison & C. R. R. Co.*, 64 Fed. Rep. 992; *Walker* v. *Keenan*, 73 Fed. Rep. 755; Reports, 7 I. C. C. 513, and 555*a*; *Int. Com. Comm.* v. *C., B. & Q. R. R. Co.*, 98 Fed. Rep. 173; *S. C.*, 103 Fed. Rep. 249; *S. C.*, 186 U. S. 320; *Cattle Raisers' Assn.* v. *C., B. & Q. R. R. Co.*, 10 I. C. C. 83, and 11 I. C. C. 296; *Commodity Rates St. Louis to Texas Points*, 11 I. C. C. 238; *Cattle Raisers' Assn.* v. *C., B. & Q. R. R. Co.*, 12 I. C. C. 507; and this case below, 164 Fed. Rep. 638.

This case is even stronger for the commission than that in which the terminal charge was condemned in 186 U. S. 320. The power of the commission to make orders such as the one in-

volved is legislative and an order should not be set aside by the courts unless it violates property rights guaranteed by the Constitution. *Maximum Rate Cases*, 167 U. S. 479; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265; *Honolulu Transit Co.* v. *Hawaii*, 211 U. S. 282.

Under the old law the function of the Interstate Commerce Commission was in its nature judicial. It passed upon the reasonableness of existing rates and the courts reviewed its conclusions just as they review those of an inferior judicial tribunal, treating the commission as a referee of the Circuit Courts of the United States. See 37 Fed. Rep. 614; *New Orleans & Texas Pacific Ry.* v. *The Interstate Commerce Commission*, 162 U. S. 184; *Maximum Rate Cases*, 167 U. S. 479. Under the act as now amended the commission fixes the rate and the courts have the same authority to review that they would if the rate had been fixed by Congress itself. The so-called "Court Review" amendment, which is embodied in the Hepburn Act, is merely declaratory. The only thing added is the venue and the express authorization of suits against the commission as a representative of the Government.

It is not the reasonableness of the rate which is now before the court; that question is submitted exclusively to the commission. The rate fixed by the commission may in the judgment of the court be unreasonable and yet it will not be declared unlawful unless it is so unreasonable as to constitute a confiscation of property. *Knoxville* v. *Water Co.*, 212 U. S. 1; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754.

The commission did not err in considering the terminal charge and the through rates together. That was settled in the *C., B. & Q. Case*, 186 U. S. 320, and there has been no change since then. The sole result of the terminal charge is to increase the cost to the shipper for the same service. Nor did the Hepburn Act since passed alter the situation. In neither

case has there been an obligation to make a terminal charge. The railroads have created the Union Stock Yards and made it their depot and the only available place for delivery of live stock in Chicago. It is the greatest live stock market in America and the other depots they have established are paper depots and no real terminal service exists. It is a pretense for the terminal charge. *Covington Stock Yards* v. *Keith*, 139 U. S. 128. No charge above one dollar per car is justifiable. Putting the two dollars terminal charge on at Chicago and not at other points made an unjust discrimination against Chicago and is not justifiable.

The order does not violate constitutional rights even if one dollar is less than the cost of terminal service.

The rule adopted below is that where railroad companies publish a terminal charge for terminal service, and the commission is called upon to declare whether or not it is reasonable, the commission must, as a matter of law, determine this question solely by the cost of the terminal service, independent of the fact that the through rate already includes compensation for the terminal service and independent of the fact that the transaction as a whole is profitable to the roads.

This is not sustained by reason or authority. To uphold it is to say that the railroads can charge twice for the same service, and the commission is without power to strike off the charge which is last put on. Even if the railroads had in this case, actually and in good faith, separated the terminal service from the through service, and the terminal charge from the through charge, the commission could reduce the terminal charge if they found that the through charge was high enough to include it.

But the railroads have not separated these two services and charges. They cannot separate the services because a shipment of live stock from the point of origin to the Union Stock Yards is one transaction and inseparable.

If a carrier adds a charge for a pretended separate service, which is already included in another service for which he is

amply paid, the commission may reduce the extra charge, even to a point below the cost of the pretended separate service. *Southern Railroad Co.* v. *The St. Louis Hay & Grain Co.*, 214 U. S. 297, distinguished.

The cost of a particular service is not a proper test of the reasonableness of the charge for it when the service performed is part of a larger transaction. *Minn. & St. Paul R. R.* v. *Minnesota*, 186 U. S. 257, 267; *St. Louis & S. F. R. R. Co.* v. *Gill*, 156 U. S. 649. See also *Atlantic Coast Line R. R. Co.* v. *N. C. Corp. Com.*, 260 U. S. 1; *Cov. & Lex. Turnpike Co.* v. *Sanford*, 164 U. S. 596; *A. & V. R. R. Co.* v. *Railroad Com. of Miss.*, 203 U. S. 496; *Railroad Co.* v. *Well & Neville*, 96 Texas, 408.

In the present case, even if one dollar per car be below the cost of the particular service, the railroads cannot complain, since the whole charge for the whole service is admittedly profitable.

It is not shown that the commission's allowed charge of one dollar per car is less than cost of terminal service. The commission's order applies only to whole transaction from point of origin and as so considered the charge is not below cost.

Every intendment of law and fact should avail to support the order of the commission.

When questions of fact are submitted to executive or administrative officers of the Government their conclusions are final. When questions so submitted involve both fact and law the conclusion will not ordinarily be disturbed by the courts. Even when a question of law only is submitted to other departments the courts will make every presumption in favor of the interpretation reached. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Marquez* v. *Frisbie*, 101 U. S. 473.

Mr. William D. McHugh and *Mr. Walker D. Hines* for appellee:

The railroad companies have divided their said rates and

have made a distinct charge for transportation from the points of shipment to Chicago, and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers.

The separate terminal charge of two dollars per car made by the railroad companies for the delivery by them of live stock to the stock yards, a point beyond the lines of their respective railroads, is not excessive since it is less than the actual cost to the railroads for the performance of such service.

Each appellee had the right to divide the charge for transportation so as to have one rate from point of shipment to a point on its tracks in Chicago, and a separate charge thence to the stock yards. *Walker* v. *Keenan*, 73 Fed. Rep. 755; *S. C.*, 7 I. C. C. Rep. 548; § 6 of the Act to Regulate Commerce; *Interstate Comm. Comm.* v. *C., B. & Q. R. R. Co.*, 186 U. S. 320, 335.

The commission's order is contrary to the Constitution. Amendment V, and see as to right of carrier to compensation for additional service, *So. Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297, 301.

There is no authority for, nor do cases cited by appellant sustain proposition that in order to set aside a rate prescribed by the commission, the carrier must show confiscation as to all its business.

The commission's order was made under clear error of law.

The courts have power to set aside any order of the commission not conforming to the statute. As to the power conferred on the commission by the statute, see Vol. 2, Hearings Before Senate Interstate Commerce Committee, pp. 1662–1674. The power of the court to review on mixed questions of law and fact, or of law alone, may be exercised without regard as to whether a constitutional right has been violated.

Judicial intervention is expressly contemplated by the act itself and in this case is especially appropriate because the regulation is of vested rights and not of matters wholly under power of Government. The right of owners of railroads to

adequate protection exists independently of consent of the Government.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The controversy as to this terminal charge has been of long duration. A history of it antecedent to the present litigation is to be found in *Interstate Commerce Commission* v. *C., B. & Q. R. R. Company*, 186 U. S. 320.

It is well to understand the precise question which is presented in this case. That question is the validity of the terminal charge of two dollars per car. The report of the commission opens with this statement: "The subject of this complaint is the so-called terminal charge of $2 per car imposed by the defendants for the delivery of carloads of live stock at the Union Stock Yards in Chicago," and its order was in terms that the railroad companies be—

"required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car.

"It is further ordered that said defendants be, and they are hereby notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the State of Illinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them."

The sixth section of the act known as the "Hepburn Act," (an act to amend the Interstate Commerce Act, passed on June 29, 1906, c. 3591, 34 Stat. 584), requires carriers to file with the commission and print and keep open to inspection

schedules showing, among other things, "separately all terminal charges . . . and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates." By § 15 the commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered off its own line, or outside the mere matter of transportation over its line, it may charge and receive compensation. *Southern Railway Co.* v. *St. Louis Hay Co.*, 214 U. S. 297. If the terminal charge be in and of itself just and reasonable it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust. In order to avail itself of the benefit of this rule the carrier must separately state its terminal or other special charge complained of, for if many matters are lumped in a single charge it is impossible for either shipper or commission to determine how much of the lump charge is for the terminal or special services. The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it. In the case in 186 U. S. *supra*, we sustained the decree of the lower court, restraining the reduction of the terminal charge from $2 to $1 as to all stock shipped to Chicago, although the commission had stated that there had been a reduction of the through rate

from certain points by from $10 to $15, in reference to which reduction and its effect upon the order of the commission we said, speaking by Mr. Justice White, after quoting from the report of the commission (pp. 338, 339):

"In other words, it was held that the rate, which was unjust and unreasonable solely because of the $1 excess, continued to be unjust and unreasonable after this rate had been reduced by from ten to fifteen dollars. This was based, not upon a finding of fact—as of course it could not have been so based—but rested alone on the ruling by the commission that it could not consider the reduction in the through rate, but must confine its attention to the $2 terminal rate, since that alone was the subject-matter of the complaint. But, as we have previously shown, the commission, in considering the terminal rate, had expressly found that it was less than the cost of service, and was therefore intrinsically just and reasonable, and could only be treated as unjust and unreasonable by considering 'the circumstances of the case;' that is, the through rate and the fact that a terminal charge was included in it, which, when added to the $2 charge, caused the terminal charge as a whole to be unreasonable. Having therefore decided that the $2 terminal charge could only be held to be unjust and unreasonable by combining it with the charge embraced in the through rate, necessarily the through rate was entitled to be taken into consideration if the previous conclusions of the commission were well founded. It cannot be in reason said that the inherent reasonableness of the terminal rate, separately considered, is irrelevant because its reasonableness is to be determined by considering the through rate and the terminal charge contained in it, and yet when the reasonableness of the rate is demonstrated, by considering the through rate as reduced, it be then held that the through rate should not be considered. In other words, two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that both the terminal charge of $2 and the through rate as reduced when separately considered were

just and reasonable, and as the further finding was that as a consequence of the reduction of from ten to fifteen dollars per car, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained."

The tariff schedules of the appellees make clear the separate terminal charge for delivery from their own lines to the Union Stock Yards. We quote the schedule of the Chicago and Northwestern Railroad Company:

"The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at, or received and transported from the stock yards of the company at Mayfair, in Chicago.

"Upon all live stock consigned to or from the Union Stock Yards in Chicago, or industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway, aforesaid, a charge of two dollars ($2.00) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards, or to said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, from this company's own rails, or of transporting such cars from said Union Stock Yards, or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, to this company's own rails."

The others are equally specific. In some of them, as in those of the Atchison, Topeka and Santa Fe Railway Company, it is provided:

"The attention of the shipper must be and is called to the fact that the transportation charge on live stock delivered at our own yards at Corwith in Chicago will be two dollars ($2.00) per car less than when delivered at the Union Stock Yards

at Chicago, or at industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and the agent should ascertain definitely at which point the shipper desires delivery to be made. The live stock contract must then be filled out so as to show the correct destination and rate as provided by the tariff and amendments."

Further, it is shown by the affidavits that the amount of such terminal charge is not entered upon the general freight charges of the companies, but is kept as a separate item. The Union Stock Yards Company is an independent corporation and the fact, if it be a fact, that most or even all of its stock is owned by the several railroad companies entering into Chicago does not make its lines or property part of the lines or property of the separate railroad companies.

With reference to the reasonableness of the terminal charge, it was stipulated on the hearing before the Interstate Commerce Commission that all the testimony taken in the former proceedings might be considered. It also appears that additional testimony was there offered. None of this testimony has been printed in the record presented to us. We have, however, our former decision as well as the report of the commission on the recent hearing, and also the affidavits filed on this application, and can consider them. It appears from the former case that, after some discussion, when testimony was being offered on the question of reasonableness, the commission suggested that it was probably unnecessary to offer further evidence, and said (186 U. S. 327):

"'To remove all doubt upon that subject, however, if it is not clearly found, we now find that, looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards and Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge is reasonable. If any modification of the present findings is necessary, they are hereby modified to that extent.'"

And in the excerpt put into the margin in the opinion of this court is a statement of the actual and estimated expense to the different railroads for making such delivery, which makes it quite clear that the charge was a reasonable one. This finding as to the reasonableness of the charge was repeated again by the commission.

In its report in the present case it said:

"The original case did not show the cost of making delivery of other kinds of carload freight at this market, but the present record shows that the average cost to one defendant, the Atchison, Topeka and Santa Fe Railway Company, of delivering all kinds of carload freight, including live stock, is $5.40 per car, while the cost of delivering live stock is not far from $2 per car. The testimony further indicates that the average cost of delivering all kinds of carload freight does not differ much in the case of the Santa Fe from that in the case of the other defendants, although it does not appear that several of the defendants are at greater expense than $2 per car in making delivery of live stock at the stock yards. We think it fairly appears upon this record that the total cost to these defendants of delivering live stock at the Union Stock Yards, including the trackage charge, is not much, if any, above one-half the average cost of handling all carload freight in the city of Chicago."

Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the commission to strike at the terminal

charge, but the convenience of commission or court is not the measure of justice.

We are unable to find any error in the conclusions of the trial judges, and their order is, therefore,

Affirmed.